

ORIGINAL



BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE COMPLAINT OF
ESCHELON TELECOM OF ARIZONA, INC.
AGAINST QWEST CORPORATION

) DOCKET NO. T-03406A-06-0257
) DOCKET NO. T-01051B-06-0257
)
)
)

Eschelon Telecom of Arizona, Inc., through undersigned counsel, hereby files the Rebuttal
Testimony of Douglas Denney and Bonnie J. Johnson in the above-captioned docket.

RESPECTFULLY SUBMITTED this 13th day of February 2007.

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Arizona Corporation Commission
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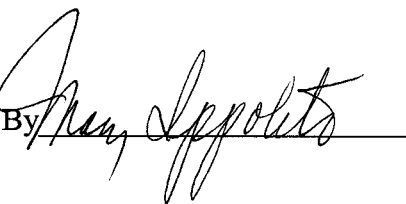
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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE COMPLAINT)	DOCKET NO. T-01051B-06-0257
OF ESCHELON TELECOM OF ARIZONA,)	DOCKET NO. T-03406A-06-0257
INC. AGAINST QWEST CORPORATION)	

REBUTTAL TESTIMONY

OF

DOUGLAS DENNEY

ON BEHALF OF

ESCHELON TELECOM OF ARIZONA, INC.

February 13, 2007

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EXECUTIVE SUMMARY

Qwest made a decision to alter its historical terms for expedites and implement admittedly non cost based¹ retail rates for providing the capability to expedite delivery of unbundled network elements (UNEs) to Eschelon, a wholesale customer. In other words, Qwest decided to increase the rate it charges CLECs without providing economic cost support or obtaining an approved UNE rate. Eschelon's contract with Qwest, which requires compliance with state and federal law,² states that Qwest "shall" provide Eschelon with "the capability to expedite a service order"³ and obligates Qwest to charge cost-based rates.⁴ *A primary issue in this complaint case is whether Qwest could impose its own decision on Eschelon – by withholding this important expedite capability – without Eschelon's mutual agreement to modify the terms of a contract under which Qwest had been providing expedite capability for almost six years.* The contract says no.⁵ Staff has also concluded that the answer to this question is no.⁶ Until January of 2006, Qwest provided expedite capability per the contract for UNEs (including "designed" facilities).⁷ Staff concluded that Qwest should continue to provide that capability based on its analysis of the contract. Another primary issue is whether Qwest's imposition of its own decision on CLECs is discriminatory. Whether the Commission decides the issue based on the contract terms or Qwest's nondiscrimination obligations or both, the Commission should also conclude that Qwest must continue to offer expedite capability per mutually agreed upon terms and at cost based rates.

For almost six years (from April 28, 2000 through approximately January 2, 2006), Qwest and Eschelon operated under a mutually agreed upon process pursuant to which Qwest provided expedites for all types of unbundled loops (and other products) at no additional charge when certain emergency conditions were met.⁸ The mutually agreed upon process was in place before Qwest documented it on its website. On September 22, 2001, Qwest issued a product notification indicating that Qwest had updated its website on methods and procedures for Expedites and Escalations to document the definition of expedite and valid expedite reasons (*i.e.*, the emergency conditions).⁹ This was not a change request or change in process. Qwest specifically recognized in the product notification that "these updates reflect current practice."¹⁰ Qwest also admits that it provided expedites for unbundled loops to Eschelon during this time.¹¹

The ICA specifically provides that any expedite procedures to be followed when *CLEC* "determines an expedite is required to meet subscriber service needs" must be "*mutually develop[ed]*."¹² Despite this express contract provision, effective January 3, 2006, Qwest stopped providing expedite capability for unbundled loops to Eschelon under the ICA without Eschelon's mutual consent. Contrary to Qwest's allegations of inaction or insufficient action, Eschelon expressly objected to Qwest's conduct in CMP comments on this change¹³ (as well as escalating in CMP a related change made close in time).¹⁴ Other CLECs were similarly taken by surprise and objected.¹⁵ One of Eschelon's objections was that Qwest is "unilaterally imposing charges via a process change in

CMP.¹⁶ Qwest admits that rates and the application of rates are outside the scope of CMP,¹⁷ and Staff agrees.¹⁸ Eschelon also specifically identified both of these attempted CMP changes as the subject of dispute in a dispute resolution letter to Qwest seeking to resolve the dispute.¹⁹ Qwest's own CMP Document requires no other action before bringing a dispute to the Commission for resolution; in fact, Eschelon did more than is required.²⁰ Therefore, Qwest is well aware that these changes were not mutually developed but made over Eschelon's express objections. These changes are not a part of the ICA, because they were not mutually developed and Eschelon did not consent to modifying the terms pursuant to which the parties operated for almost six years under the ICA. If changes are made in CMP that conflict with an ICA, or abridge the rights of a party under an ICA, the CMP Document expressly provides that the terms of the ICA control.²¹ Qwest was also aware of this term of its own CMP Document. Therefore, Qwest should have continued to provide expedite capability to Eschelon under its current contract and, if Qwest desired a change, sought dispute resolution rather than refuse to provide service in violation of the contract.²²

Regarding the "retail" versus "wholesale" rate issue, Qwest argues it should be able to impose upon Eschelon and other CLECs the same rate that Qwest charges its private line retail customers. Qwest erroneously equates providing a retail service *at the same price* with providing wholesale service on nondiscriminatory terms.²³ The threshold question to be addressed is whether for itself Qwest provides the service to its retail customers, separate from the question of price. If so, the analysis moves to another question, which addresses what the wholesale price should be. Qwest inappropriately collapses these two questions into one.

As to the threshold question, it is undisputed that Qwest provides the capability to expedite orders for its retail customers.²⁴ As to the wholesale price to be charged, it should be based on economic cost because Qwest faces its own costs in providing expedites of orders. Qwest does not explicitly or implicitly charge itself a non cost based, market rate in order to expedite orders for its retail customers. Rather, it only incurs the cost of expediting such orders. By proposing to charge Eschelon a non cost based price that is higher than Qwest's own expedite costs, Qwest proposes to violate its nondiscrimination obligation²⁵ because this price constitutes terms that are less favorable than terms faced by Qwest in expediting its own orders (*i.e.*, the term that Qwest offers "to itself").²⁶

Because for itself Qwest provides expedites to its retail customers, the analysis moves to the next question, which addresses what the wholesale price should be. The wholesale price should be determined based on economic cost. Qwest historically has treated expedites as a rate element subject to cost based pricing. Expedite capability was provided for six years as part of the Section 251 ICA between Eschelon and Qwest – since 2000. In 2001, Qwest confirmed that expedites were a part of accessing UNEs when Qwest asked the Commission to establish an Individual Case Basis ("ICB") rate for

expedites.¹ As discussed below, the Qwest witness listed expedites as within the category of UNEs, which means that Qwest understood they were subject to cost-based (*i.e.* TELRIC) pricing. Qwest proposed to charge for expedites on an ICB basis. The Commission in its order in the UNE Cost Docket found that: "Qwest is directed to develop cost studies for all services offered in this docket on an ICB price basis in Phase III. Qwest should make every effort to *develop reasonable cost-based prices* for such services even if it has little or no experience actually provisioning the services."²⁷ Qwest recognizes this fact, as its current Arizona SGAT (dated February 10, 2005) lists footnote five next to the Expedite rate element.²⁸ Footnote five reads: "Rates for this element *will be proposed in Arizona Cost Docket Phase III* and may not reflect what will be proposed in Phase III. There may be additional elements designated for Phase III beyond what are reflected here."²⁹ Qwest has never sought permission from this Commission to remove expedites from the list of UNE rate elements, nor has the Commission issued an order removing expedites. Therefore, cost-based rates for expedites are still required by the Commission's order, in addition to Section 252(d)(1)(A)(i) of the federal Act.

Today, however, Qwest argues that cost-based rates do not apply. Its proffered reasons why charges for expedites allegedly need not be cost based have vacillated. Qwest has argued that expedites are "not UNEs"³⁰ (in direct contradiction to the Qwest filing described in the previous paragraph). In contrast, Qwest has also implicitly accepted that expedites are part of accessing UNEs because it has described expedites in the context of the statutory requirements for offering "access to network elements on a nondiscriminatory basis" based on whether the network element has a "retail analogue."³¹ Regarding the first of these claims, Qwest argues that expedites are not UNEs because they are "superior" services. As discussed, however, for itself Qwest provides expedites to its retail customers, so the service is not superior to that which it provides to itself – the relevant comparison. Regarding the second of these claims, Qwest has claimed both that UNE loops do *not* have a retail analogue (though it now claims this applies to UNE DSO loops)³² and that UNE DS1 and DS3 loops *do* have a retail analogue.³³ In any event, the FCC has said specifically that the nondiscrimination test is no less rigorous when there is no retail analogue.³⁴ In either case, Qwest must provide "*access to* network elements on a nondiscriminatory basis."³⁵ In ¶268 of its *First Report and Order*, the FCC found that the requirement to provide "access" to UNEs must be read broadly, concluding that the Act requires that UNEs "be provisioned in a way that would make them useful." Expedites are needed to make UNEs useful and to allow Eschelon a meaningful opportunity to compete.

Per Qwest,³⁶ for UNE DS1 and DS3 loops, the applicable nondiscrimination test is the test when a network element has a retail analogue: whether Qwest provides "*access to* competing carriers in 'substantially the same time and manner' as it provides to itself."³⁷ Note, the FCC's test does *not* say in substantially the same time and manner *and at the*

¹ See Exhibit Denney (DD)-4.

same price. Currently, under the existing Qwest-Eschelon ICA, Qwest does not provide expedite capability to Eschelon for UNE DS1 and DS3 loops *at all*, much less in the same time and manner. As the rehabilitation center example described in the Complaint³⁸ shows, Qwest refuses to provide expedite capability for DS1 capable loops under that contract's existing terms today, despite having provided expedite capability for DS1 capable loops under the same contract for nearly six years.

For all of these reasons, the Commission should conclude that Qwest did not adhere to the ICA and must continue to offer expedites for all products (including all types of unbundled loops) at no additional charge when the emergency conditions (*i.e.*, the emergency conditions that were in place before Qwest PCAT Versions 27 and 30) are met. Qwest has presented no evidence that this is not cost-based. CLECs continue to pay the installation NRC, which is separate from an expedite fee, with respect to the expedited order. Qwest performs the same provisioning activities; it simply performs them earlier.³⁹ In addition, Qwest provides expedites when the identified emergency conditions are met only if resources are available. Therefore, Qwest incurs no cost to add resources for expediting an order when the emergency conditions are met.

Staff concludes that Qwest should also continue to offer an option to CLECs to obtain expedited delivery of products for a separate expedite fee (in addition to the installation charge) when the emergency conditions are not met.⁴⁰ Staff also concludes that the rate(s) for expedites be considered as part of the next cost docket.⁴¹ The Commission should adopt these conclusions. Once it is confirmed that any separate, additional charge for expediting orders when the emergency conditions are not met must be cost-based, the deadlock over retail tariff rates versus wholesale cost-based rates should be broken. Perhaps then a negotiated resolution can be reached, at least for rates on an interim basis until the Commission decides the issue in a cost docket. If it is not broken or resolved, the fee-added expedite terms will be optional, and Eschelon will continue to be able to obtain expedited delivery of UNE orders under its existing ICA when the emergency-based conditions are met, as it was able to do for the first nearly six years of operating under the contract.

For End Notes to Executive Summary – see next page

ENDNOTES TO EXECUTIVE SUMMARY

¹ See, e.g., Million Direct, p. 2, line 9 (“nor is it required to be priced on a cost basis”); *id.* p. 6, line 14 (“based on what the market will bear.”).

² See, e.g., Exhibit DD-3 (Excerpts from Qwest-Eschelon ICA), Part A, §24.3: “All terms, conditions and operations under this Agreement shall be performed in accordance with all applicable laws, regulations and judicial or regulatory decisions of all duly constituted governmental authorities with appropriate jurisdiction, and this Agreement shall be implemented consistent with the FCC Interconnection Order and any applicable Commission orders.”

³ Exhibit DD-3 (Excerpts from Qwest-Eschelon ICA), Att. 5, §3.2.2.13.

⁴ See, e.g., Exhibit DD-3 (Excerpts from Qwest-Eschelon ICA), Att. 3, §2.1 provides that Qwest will provide Eschelon with Network Elements “on an unbundled basis on rates, terms and conditions that are just, reasonable, and non-discriminatory in accordance with the terms and conditions of this Agreement.” Section 252(d)(1) of the Act provides that “Determinations by a State commission of the just and reasonable rate for . . . network elements for purposes of subsection (c)(3) of” section 251 of the Act shall be based on cost. See 47 U.S.C. §252(d)(1)(A)(i).

⁵ Exhibit DD-3 (Excerpts from Qwest-Eschelon ICA), Scope, ¶ I (“Except as otherwise provided for in Section 8 of Attachment 2, U S WEST shall not discontinue or refuse to provide any service required hereunder without CO-PROVIDER’s prior written agreement in accordance with Section 17 of this Part A of this Agreement”). Section 17 of Part A is the Amendment of Agreement section of the ICA. (Attachment 2 is the Resale section of the ICA.)

⁶ Staff Testimony, Executive Summary, Staff Conclusion No. 1.

⁷ Answer, Page 9 ¶ 14 Lines 24-25 (“Qwest previously expedited orders for unbundled loops on an expedited basis for Eschelon”).

⁸ See Exhibit Johnson (“BJJ”) D (Examples of Expedite Requests Approved by Qwest for Unbundled Loop Orders).

⁹ See Exhibit BJJ A-1 at 000022-000025 - Product Notification for Version 1 of the Expedites & Escalations Overview in PCAT.

¹⁰ See *id.* at Document No. 000022.

¹¹ Answer, Page 9 ¶ 14 Lines 24-25 (“Qwest previously expedited orders for unbundled loops on an expedited basis for Eschelon”); see also Novak Direct, p. p. 5, lines 5-12 & lines 21-22 (Qwest “uniformly followed the process in existence at the time for expediting orders for unbundled loops”).

¹² Exhibit DD-3 (Excerpts from Qwest-Eschelon ICA), Att. 5, §3.2.2.12.

¹³ See BJJ A-7 at 000124-000126 (Eschelon 11/3/05 CMP Comments on Qwest-initiated Version 30 notification) (“Qwest is now failing to keep the commitments it made to CLECs in CMP, and in its response to Covad, by now changing its position on expedites and **unilaterally imposing charges via a process change in CMP**. Qwest’s proposed change to remove the existing approval required expedite process for designed products **will negatively impact Eschelon and its customers**. . . . **Eschelon objects** to Qwest’s proposed changes to the current approval required expedite process because it is **discriminatory** to CLECs and CLEC customers. In addition, because Eschelon relied upon Qwest’s comments to Covad’s CR, Eschelon **also objects** to Qwest’s addition of UBL DS0 products to the pre-approved list of products. Qwest chose to make the change to the approval required expedite process after it added DS0 loops to the product list for pre-approved products. The result is that CLECs were unable to effectively comment on a change that now, coupled with Qwest’s further change, **significantly impacts a CLEC’s business**.”) (emphasis added).

¹⁴ See BJJ A-7 at 000118 (McLeodUSA CMP escalation of Qwest-initiated Version 27 notification) & 000120 (Qwest email confirming “Eschelon did join the escalation”).

¹⁵ For example, Integra, in its objections to Qwest’s Version 30 change, said: “When Integra signed the Qwest Expedite Amendment were not advised that by signing the amendment it would change the current Expedites Requiring Approval process.” See Exhibit BJJ A-7 at 000127-000128. McLeodUSA (in an escalation of the Version 27 change joined by Eschelon) said: “McLeodUSA was not even aware this issue

was on the table for discussion.” *Id.* at 000118. In its September 12, 2005 initial notice for Qwest’s Version 27 change, Qwest said: “Customers who currently have an expedite amendment will automatically be included in this change.” *See* Exhibit BJJ-J. In other words, Qwest was changing the ICA terms after the affected amendments were signed – and after the Covad CR under which such proposed changes should have been identified was closed with Qwest’s consent but without its disclosure of these terms in July of 2005 – which perhaps partially explains their surprise.

¹⁶ *Id.* at 000124.

¹⁷ Martain Direct, p. 2, line 39.

¹⁸ Staff Testimony, p. 29, lines 4-5.

¹⁹ Exhibit BJJ A-7 at 000137 (April 3, 2006 dispute resolution letter) (with the subject line identifying the Joint McLeod-Eschelon Escalation of Version 27 changes and Eschelon’s 11/305 objections to Version 30 changes as subjects of the dispute resolution).

²⁰ CMP Document, Qwest Exhibit JM-D1 & Eschelon Exhibit BJJ A-9. For example, Section 15.0 (“Dispute Resolution”) of the CMP Document states: “This process does not limit any party’s right to seek remedies in a regulatory or legal arena at any time.” *See id.* It also provides: “Without the necessity for a prior ADR Process, Qwest or any CLEC may submit the issue, following the commission’s established procedures, with the appropriate regulatory agency requesting resolution of the dispute. This provision is not intended to change the scope of any regulatory agency’s authority with regard to Qwest or the CLECs.” *See id.* Other procedures in the document are likewise optional. For example, there is an escalation process, but it is not a prerequisite to dispute resolution. *See* Exhibit BJJ-I (October 2-3, 2001 CMP Redesign Meeting Minutes, Att. 4, pp. 35-36, Action Item #83).

²¹ CMP Document, Section 1.0 (Scope), Qwest Exhibit JM-D1 & Eschelon Exhibit BJJ A-9.

²² Exhibit DD-3 (Excerpts from Qwest-Eschelon ICA), Scope, ¶ 1 (“Except as otherwise provided for in Section 8 of Attachment 2, U S WEST shall not discontinue or refuse to provide any service required hereunder without CO-PROVIDER’s *prior* written agreement in accordance with Section 17 of this Part A of this Agreement”) (emphasis added). Section 17 of Part A is the Amendment of Agreement section of the ICA. (Attachment 2 is the Resale section of the ICA.)

²³ *Cf.* 47 U.S.C. §252(d)(1)(A), which requires rates to be both “based on cost” *and* “nondiscriminatory.”

²⁴ *See, e.g.,* Albersheim Direct in Qwest-Eschelon AZ ICA Arbitration, p. 61, lines 15-16 (“... Qwest offers expedites today to its retail customers. . .”). Qwest provides expedites to its retail customers served using both “non-designed” and “designed” facilities. *See, e.g.,* Martain Direct, p. 34, lines 17-19.

²⁵ *See* §51.313. *See also* FCC First Report and Order ¶218 (“Therefore, we reject for purposes of section 251, our historical interpretation of “nondiscriminatory,” which we interpreted to mean a comparison between what the incumbent LEC provided other parties in a regulated monopoly environment. We believe that the term “nondiscriminatory,” as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties *as well as on itself.*”) (emphasis added).

²⁶ *See id.* & §51.313(b) (nondiscriminatory terms for the provision of UNEs shall be no less favorable to CLEC than the terms that the ILEC provides “to itself”).

²⁷ *Phase II UNE Cost Docket*, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p. 75 (emphasis added); *see also* Exhibit DD-4 (excerpts from order and Qwest testimony).

²⁸ *See* Exhibit C to Webber Direct (adopted) (SGAT pages, p. 14 of 19). Qwest’s SGAT is available at its website. *See* Section 9.20.14 for the Expedite rate element. http://www.qwest.com/about/policy/sgats/SGATsdocs/arizona/AZ_14th_Rev_3rd_Amend_Exh_A_2_10_05_Clean.pdf

²⁹ Exhibit C to Webber Direct (adopted) (SGAT page at 0001675, note 5 (emphasis added)).

³⁰ Qwest-Eschelon AZ ICA Arbitration Albersheim Direct, p. 64, line 12.

³¹ *In the Matter of the Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, FCC 99-404, CC Docket No. 99-295, rel. December 22, 1999 [“Bell Atlantic NY 271 Order”] at ¶ 44.

³² In its November 18, 2005 CMP Response, Qwest gave the following reason for its refusal to provide the capability to expedite orders for loops under the Expedites Process: "Qwest does not sell **Unbundled Loops** to its end user customers so it is not appropriate to make a comparison to retail in this situation." See Exhibit BJJ A-7 at 000124 (last paragraph) (emphasis added). Although today Qwest attempts to limit this statement to DS0 loops (see Albersheim Direct, p. 12, lines 18-19), the statement on its face applied to all unbundled loops. Qwest made this statement to CLEC operational personnel in the CMP context.

³³ Albersheim Direct, p. 12, lines 18-19.

³⁴ Bell Atlantic NY 271 Order at ¶ 55.

³⁵ Bell Atlantic NY 271 Order at ¶ 44. In other words, one cannot conclude that "no retail analogue" means "no discrimination." An analysis must be made of whether the access the ILEC provides to CLECs offers a meaningful opportunity to compete. See *id.*

³⁶ Albersheim Direct, p. 12, lines 18-19 ("DS1 Capable Loops and DS3 Capable Loops have a retail analogue; specifically, DS1 and DS3 private lines respectively").

³⁷ Bell Atlantic NY 271 Order at ¶ 44 (test to be applied when there is a retail analogue) (emphasis added).

³⁸ Complaint, ¶¶ 22-41.

³⁹ MN ICA Arbitration Transcript (Million), Vol. 2, p. 97, line 18-p, 98, line 22 & p. 97, lines 24-25 ("Q You do the same thing; you just do it faster? A That's correct.").

⁴⁰ Staff Testimony, Executive Summary, Staff Conclusion No. 2.

⁴¹ Staff Testimony, Executive Summary, Staff Conclusion No. 7.

1 **I. INTRODUCTION**

2 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

3 A. My name is Douglas Denney and I work at 730 2nd Avenue South, Suite 900,
4 Minneapolis, Minnesota 55402.

5 **Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?**

6 A. I am employed by Eschelon Telecom, Inc., as Senior Manager of Costs and
7 Policy. My responsibilities include negotiating interconnection agreements,
8 monitoring, reviewing and analyzing the wholesale costs Eschelon pays to
9 carriers such as Qwest, and representing Eschelon on regulatory issues.

10 **Q. PLEASE DESCRIBE YOUR EDUCATION AND PROFESSIONAL**
11 **BACKGROUND.**

12 A. I received a B.S. degree in Business Management from Phillips University in
13 1988. I spent three years doing graduate work at the University of Arizona in
14 Economics, and then I transferred to Oregon State University where I have
15 completed all the requirements for a Ph.D. except my dissertation. My field of
16 study was Industrial Organization, and I focused on cost models and the
17 measurement of market power. I taught a variety of economics courses at the
18 University of Arizona and Oregon State University. I was hired by AT&T in
19 December 1996 and spent most of my time with AT&T analyzing cost models. In
20 December 2004, I was hired by Eschelon Telecom, Inc., where I am presently
21 employed.

1 I have participated in over 30 proceedings in the 14-state Qwest region. Much of
2 my prior testimony involved cost models — including the HAI Model, BCPM,
3 GTE's ICM, U S WEST's Unbundled Network Element ("UNE") cost models,
4 and the FCC's Synthesis Model. In addition I have testified about issues relating
5 to the wholesale cost of local service — including universal service funding,
6 unbundled network element pricing, geographic deaveraging, and competitive
7 local exchange carrier access rates. I have also testified about issues surrounding
8 the FCC's Triennial Review Order and Triennial Review Remand Order,
9 including Qwest's "non-impaired" wire center lists and related issues. Most
10 recently I have filed testimony on numerous issues in the Eschelon / Qwest ICA
11 arbitrations in Arizona, Colorado, Minnesota and Washington.

12 **Q. HAVE YOU PREVIOUSLY TESTIFIED IN ARIZONA?**

13 A. Yes. When I was with AT&T, I testified in multiple phases of docket T-00000A-
14 00-194. I testified on geographic deaveraging in Phase I. In Phase II, I supported
15 the HAI Model, which this commission adopted to set many of the recurring UNE
16 rates that are in place today. In Phase IIa, I testified about the switching costs
17 included in the HAI Model. I also filed testimony in docket T-00000A-03-0369,
18 the original Triennial Review Order ("TRO") docket, which was stopped after the
19 D.C. Circuit remanded parts of the TRO to the FCC. Since I have been with
20 Eschelon, I have presented oral comments in docket T-00000I-04-0749 regarding
21 the current state of competition and filed testimony in docket T-03632A-06-0091
22 addressing key UNE issues arising from the Triennial Review Remand Order,

1 including a review of Qwest's list of Arizona non-impaired wire centers. Most
2 recently I have filed testimony on behalf of Eschelon in interconnection
3 arbitration proceedings with Qwest, dockets T-03406A-06-0572/T-01051B-06-
4 0572.

5 **Q. ARE YOU ADOPTING ANY TESTIMONY?**

6 A. Yes. I am adopting the direct testimony of Mr. Webber, except for the description
7 of his background, in this matter.

8 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

9 A. My purpose is to respond to the direct testimony of Qwest's witnesses in this
10 matter. I have provided an Executive Summary at the beginning of this
11 testimony.

12 **Q. DOES YOUR TESTIMONY INCLUDE ANY EXHIBITS?**

13 A. Yes. My testimony includes the following Exhibits:

14 **Exhibit DD-1** is a list of Eschelon Direct and Rebuttal Exhibits.

15 **Exhibit DD-2** is a chart regarding expedite capability for unbundled loops.

16 **Exhibit DD-3** contains contract provisions taken from the current Qwest-
17 Eschelon interconnection agreement (ICA) in Arizona

18 **Exhibit DD-4** is excerpts from the UNE Cost Docket order and Qwest's
19 testimony regarding expedites and an ICB rate in that case

20 **Exhibit DD-5** is Qwest's Expedite Amendment requiring a rate of \$200 per day

21 **Exhibit DD-6** is a transcription of a Jean Novak and Chris Siewert of Qwest
22 voice mail for Rhonda Knudson of Eschelon regarding Qwest's decision not to
23 expedite Eschelon's request

1 **Exhibit DD-7** contains the current and historical tariff pages from Qwest's tariff
2 FCC #1 and Qwest's Arizona Competitive Private Line Transport Services
3 regarding expedites (FCC tariff documents includes Qwest's transmittal to the
4 FCC explaining its change in the expedite rate)

5 **Exhibit DD-8** is a discussion of facts in response to the testimony of Jean Novak
6 of Qwest surrounding payment disputes between Eschelon and Qwest (includes
7 *CONFIDENTIAL* Attachment A containing a chronology of the dispute)

8 **Exhibit DD-9** is an email from Eschelon reminding Qwest that the designation of
9 customer-identifying information (including customer name) is confidential
10 customer proprietary information (CPNI)

11 **II. DISCUSSION**

12 **A. STAFF CONCLUSIONS, STATUS OF NEGOTIATIONS AND**
13 **ARBITRATION, AND MINNESOTA ALJ REPORT ON EXPEDITES**

14 **Q. STAFF FILED TESTIMONY IN THIS MATTER ON JANUARY 30, 2007.**
15 **HAVE YOU REVIEWED THE SEVEN CONCLUSIONS OF STAFF, AND**
16 **DO YOU AGREE WITH THEM?**

17 **A.** Yes. Staff summarizes seven conclusions in the Executive Summary to the direct
18 testimony of Pamela Genung ("Staff Testimony").¹ Eschelon agrees with these
19 Staff conclusions. In Eschelon's Complaint, Eschelon requested an order
20 providing any relief that this Commission deems to be proper and just,² and the
21 Staff's proposed relief is proper and just. For the most part, I will address these

¹ Direct Testimony of Pamela Genung, *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (Jan. 30, 2007) ("Staff Testimony") at Executive Summary. Eschelon will refer to the Staff conclusions in the Executive Summary by number, such as Staff Conclusion No. 1.

² Complaint, p. 14, ¶K; *see also id.* pp. 13-14 ¶¶ A, B, H, I, & J; *see also id.* ¶4, citing 47 U.S.C. § 251(c)(2)(D) and (3) and §252, 47 C.F.R. § 51.313, and Arizona Revised Statutes §§ 40-424, 40-246, 40-248, 40-249, 40-334 and 40-361.

1 Staff conclusions as I discuss the pertinent issues in my testimony. Before doing
2 so, I will discuss two of the seven Staff conclusions here, because they
3 specifically require action by Eschelon. Therefore, Eschelon wants to make clear
4 that it will act in accordance with these recommendations.

5 First, Staff Conclusion Number Four indicates that "Eschelon should implement a
6 training or refresher training program for its representatives stressing the
7 importance of accuracy when ordering changes to their customer's service in
8 order to try to avoid or minimize unnecessary customer service outages."
9 Eschelon has already started preparation of a refresher training program and is
10 willing to coordinate with Staff to ensure that the training meets Staff's
11 expectations. This new training will be in addition to the one-on-one coaching³
12 that occurred in the spring of 2006 with respect to the disconnect in error in the
13 rehabilitation center example described in the Complaint,⁴ in addition to
14 Eschelon's internal meetings in the fall of 2006 to review disconnects in error and
15 discuss ways to try to avoid them and ensure accuracy. Although disconnects in
16 error are caused by Qwest as well,⁵ Eschelon has no objection to conducting

³ The cause of the disconnect in error was not a disputed issue in this case. When Eschelon learned of its error, it acknowledged the mistake to its Customer (*see* Eschelon Chronology, Attachment 1 to Staff Testimony, ¶7), and Eschelon admitted it in the Complaint in this proceeding (p. 2, lines 3-4 & p. 9, ¶26, lines 20-22). Accuracy is important, and Eschelon followed up at the time with one-on-one coaching with the individual who made the error to attempt to avoid similar errors in the future.

⁴ Complaint, ¶¶22-41.

⁵ Historically and currently, Qwest specifically identifies "Disconnects in error by Qwest" as one of the conditions for granting expedites when certain emergency conditions are met. *See, e.g.*, Exhibit Johnson (BJJ) A-1 at Document Nos. 000017 (Qwest Expedites and Escalations Overview PCAT Version 8) & Exhibit BJJ A-6 at 000107 (Qwest Expedites and Escalations Overview PCAT Version 30). Qwest-caused disconnects in error occur frequently enough, therefore, that they have

1 refresher training for its own employees on avoiding disconnects in error because
2 of the importance of avoiding customer service disruption.

3 Second, Staff Conclusion Number Six states that "Qwest and CLECs should
4 include expedites of the installation of Unbundled Loops in their Interconnection
5 Agreement negotiations." Eschelon remains willing to negotiate expedite terms
6 and conditions, including an interim rate(s), for its ICA, consistent with this Staff
7 conclusion. Eschelon has previously asked Qwest to negotiate such terms with
8 Eschelon, both in the context of a voluntary amendment to the existing ICA⁶ and
9 with respect to the next ICA.⁷

10 Qwest has refused, however, to negotiate terms such as those that had been
11 available for six years under the existing ICA before Qwest breached it (including
12 not charging a separate expedite fee when certain emergency conditions are met)
13 or to negotiate a wholesale interim rate (or any rate other than its retail rate) for
14 expediting wholesale orders. Staff has indicated that "CLECs should not be

merited being separately identified on that Qwest list of emergency conditions for many years. With its direct testimony, Eschelon provided twenty-one examples of Qwest-caused disconnects in error that resulted in disconnection of service to Eschelon end user customers. *See* Exhibit BJJ C.

⁶ *See, e.g.*, Exhibit BJJ A-7 at 000132, Eschelon dispute resolution letter to Qwest (dated March 21, 2006), p. 3, footnote 1 ("If Qwest desires a voluntary amendment, please negotiate with us and begin by providing cost studies supporting Qwest's proposed rate for each state to Eschelon pursuant to Section 252(d) of the Act, 47 CRF § 51.301, and paragraph 155 of the FCC's First Report and Order. Eschelon has signed a confidentiality agreement and requested cost studies for all unapproved rates in the new ICA negotiations, but Qwest has not yet provided a cost study for its proposed expedite rate. While Eschelon is reviewing those cost studies, however, Qwest needs to process expedites pursuant to the existing ICAs.").

⁷ *See, e.g.*, Exhibit BJJ A-7 at 000133, Eschelon dispute resolution letter to Qwest (dated March 21, 2006), p. 4, footnote 3 ("Negotiation of new ICAs is well underway and, if any issues need to be addressed in those negotiations, Eschelon will also work with Qwest in that context for events that will occur after the Effective Date of the new ICAs.").

1 forced into signing” Qwest’s expedite amendment.⁸ Staff added that “since
2 CLEC interconnection agreements are voluntarily negotiated or arbitrated,”
3 Qwest could have taken the issue to arbitration under the Qwest-Eschelon ICA,
4 “rather than trying to force Eschelon into signing an amendment.”⁹ In the
5 particular rehabilitation center example described in the Complaint,¹⁰ the Staff
6 indicated that “Qwest should have expedited the request first and then followed
7 up afterwards with the dispute resolution process.”¹¹ Instead, Qwest refused to
8 provide expedite capability under the existing ICA while the customer was out of
9 service.

10 Staff also concludes that the rate(s) for expedites be considered as part of the next
11 cost docket.¹² The Commission should adopt this conclusion. Once it is
12 confirmed that any separate, additional charge for expediting orders when the
13 emergency conditions are not met must be cost-based, the deadlock over retail
14 tariff rates versus wholesale cost-based rates should be broken. Perhaps then a
15 negotiated resolution can be reached, at least for rates on an interim basis, until
16 the Commission decides the issue in a cost docket. If it is not broken or resolved,
17 and the Staff’s conclusions are adopted, the fee-added expedite terms will be
18 optional, and Eschelon will continue to be able to obtain expedited delivery of

⁸ Staff Testimony, p. 34, lines 10-11.

⁹ *Id.* p. 36, line 21 – p. 37, line 2.

¹⁰ Complaint, ¶¶22-41.

¹¹ Staff Testimony, p. 34, lines 19-20.

¹² Staff Testimony, Executive Summary, Staff Conclusion No. 7.

1 UNE orders under its existing ICA when the emergency-based conditions are met,
2 as it was able to do for the first nearly six years of operating under the contract.

3 **Q. WHAT IS THE CURRENT STATUS OF INTERCONNECTION**
4 **AGREEMENT NEGOTIATIONS AND ARBITRATION?**

5 A. With respect to the existing ICA, as discussed in the previous response, Qwest did
6 not seek dispute resolution when it should have, and Eschelon's efforts at dispute
7 resolution did not lead to resolution. Therefore, this Complaint is pending for
8 resolution by the Commission.

9 With respect to a new ICA, as the companies also have not reached agreement,
10 the terms for expediting orders are an issue in the Qwest-Eschelon ICA
11 arbitrations, and these arbitrations will determine the terms and conditions for
12 expedites in the new ICAs in six states, including Arizona.¹³ In the arbitration,
13 Eschelon is proposing a flat \$100 per order interim wholesale expedite fee,¹⁴

¹³ Arizona Docket Nos. T-03406A-06-0572, T-01051B-06-0572 ("AZ ICA Arbitration"). The other five states are Colorado, Minnesota, Oregon, Utah, and Washington. The Utah petition has not yet been filed. The other docket numbers are CO (06B-497T), MN (P5340, 521/IC-06-768), OR (ARB 775), and WA (UT-063061).

¹⁴ Qwest erroneously describes Eschelon's arbitration proposal as a "per day" fee. *See* Million Direct, p. 7, lines 5-6. Eschelon's proposal is not a per day fee. *See* Qwest-Eschelon AZ ICA Arbitration, Webber Direct, p. 92, lines 18-20. A per day fee has no reasonable relationship to cost. *See* Webber Direct (adopted), pp. 41-42. As Qwest knows, Eschelon inadvertently included in a reference to per day in its Minnesota ICA arbitration testimony but corrected in an errata filing. *See* Eschelon's MN Errata Filing (Sept. 28, 2006). *See also* MN Hearing Ex. 35 (Webber Surreb.), p. 49, lines 6-10 ("On September 28, 2006 Eschelon filed an errata correcting my testimony to clarify that Eschelon's proposal is a flat (not per day) \$100 fee. This error did not affect materially my arguments, or arguments made by Qwest. Also note that Ms. Albersheim's direct testimony correctly presents Eschelon's proposal as a \$100 (not a per day) fee. MN Albersheim Direct, p. 59 line 12."). Therefore, Qwest knows that any reference to "per day" is in error. In the arbitrations, the expedite rate is Issue 12-67(g). Eschelon's proposal of a flat \$100 interim expedite charge is accurately represented in Exhibit A (the rate sheet at Section 9.20.14) and in the joint Disputed Issues Matrix for Issue 12-67(g) (Exhibit 3 to Arbitration Petition, p.

1 which Eschelon would pay in addition to the installation non-recurring charge
2 ("NRC"). Although Eschelon believes this rate exceeds costs, Eschelon offers the
3 rate on an interim basis as a compromise in the arbitrations until a cost-based rate
4 is established. (Eschelon is also willing to accept the compromise rate as a filed
5 negotiated rate for when the conditions are not met, eliminating the need to
6 establish a rate in a cost docket, but Qwest does not agree.) Qwest is proposing a
7 non cost based retail tariff rate.

8 The ICA Section 252 Qwest-Eschelon arbitration involves contract language to be
9 included in a new ICA to apply going forward. In contrast, this case deals with
10 events that occurred during the term of the existing Commission-approved Qwest-
11 Eschelon ICA that has been in place since 2000.¹⁵ In this case, with respect to a
12 rate when the emergency conditions are not met, the Commission need only
13 confirm the Commission's ruling in the previous UNE Cost Docket order
14 requiring cost-based rates for expedites.¹⁶ Although it may set an interim rate for
15 when the emergency conditions are not met if it chooses, it need not do so in this
16 case. (In the arbitration, in contrast, Eschelon is asking the Commission to set an
17 interim rate for the new ICA going forward until a rate is set in a cost docket.) In
18 the meantime, if Staff Conclusion Nos. 1 and 2 are adopted, if no interim rate is

173) in the Arizona arbitration. Ms. Albersheim also correctly describes Eschelon's proposal in her Arizona direct testimony in the arbitration. See Albersheim AZ ICA Arbitration Direct, p. 64, lines 3-5.

¹⁵ Decision No. 62489, Docket Nos. T-01051B-00-109; T-03406A-00-0109 (April 28, 2000) (order approving Qwest-Eschelon ICA, which the order describes in paragraph 4 as "essentially the same as the interconnection agreement between U S WEST and AT&T").

¹⁶ *Phase II UNE Cost Docket*, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p. 75.

1 set for when the emergency conditions are not met and the parties cannot agree, as
2 discussed, the fee-added expedite terms will be optional. Therefore, Eschelon
3 would continue to be able to obtain expedited delivery of UNE orders at no
4 additional fee under its existing ICA when the emergency-based conditions are
5 met.

6 **Q. SINCE FILING YOUR DIRECT TESTIMONY, HAS ANY RULING**
7 **REGARDING EXPEDITES BEEN ISSUED IN THE QWEST-ESCHELON**
8 **ICA ARBITRATION PROCEEDINGS?**

9 A. Yes. In Minnesota, the Administrative Law Judges ("ALJs") issued a Report with
10 recommendations regarding arbitration Issue 12-67 (Expedited Orders).

11 **Q. PLEASE DESCRIBE THE MINNESOTA ALJS' DECISION.**

12 A. The ALJs agreed with Eschelon with respect to: (1) the role of the Qwest Change
13 Management Process ("CMP"); (2) expedites being an integral part of access to
14 UNEs (i.e., *not* a superior service); and (3) cost-based rates.¹⁷ The ALJs rejected
15 Qwest's retail tariff rate proposal and recommended adoption of Eschelon's
16 positions regarding an interim rate and TELRIC pricing.¹⁸

17 First, regarding Qwest's expedite-related activities in CMP, the ALJs found that
18 the "CMP process by which Qwest reached its current position is not the

¹⁷ Arbitrators' Report, *In the Matter of the Petition of Eschelon Telecom, Inc., for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. §252(b) of the Federal Telecommunications Act of 1996*, MN OAH 3-2500-17369-2; MPUC No. P-5340,421/IC-06-768 (Jan. 16, 2006) [MN Arbitrators' Report"], at ¶¶ 21-22 & 219-222.

¹⁸ MN Arbitrators' Report, at ¶¶ 221-222.

1 controlling factor on whether emergency situations should create an exception to
2 charging an additional fee for expedited ordering.¹⁹ More generally regarding
3 CMP, the ALJs made a separate finding regarding CMP that:

4 The CMP document itself provides that in cases of conflict
5 between changes implemented through the CMP and any CLEC
6 ICA, the rates, terms and conditions of the ICA shall prevail. In
7 addition, if changes implemented through CMP do not necessarily
8 present a direct conflict with an ICA but would abridge or expand
9 the rights of a party, the rates, terms, and conditions of the ICA
10 shall prevail.²⁰ Clearly, the CMP process would permit the
11 provisions of an ICA and the CMP to coexist, conflict, or
12 potentially overlap. The Administrative Law Judges agree with the
13 Department's analysis that any negotiated issue that relates to a
14 term and condition of interconnection may properly be included in
15 an ICA, subject to a balancing of the parties' interests and a
16 determination of what is reasonable, non-discriminatory, and in the
17 public interest. *Eschelon has provided convincing evidence that*
18 *the CMP process does not always provide CLECs with adequate*
19 *protection from Qwest making important unilateral changes in*
20 *the terms and conditions of interconnection.*²¹

21 Second, regarding access to UNEs, the ALJs specifically found: "When Eschelon
22 requests an expedite, it will be for accessing a UNE. Under 47 U.S.C. §§ 51.307
23 and 51.313, it must be provided under Section 251 of the Act and, thus, at
24 TELRIC rates."²²

¹⁹ Arbitrators' Report, *In the Matter of the Petition of Eschelon Telecom, Inc., for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. §252(b) of the Federal Telecommunications Act of 1996*, MN OAH 3-2500-17369-2; MPUC No. P-5340,421/IC-06-768 (Jan. 16, 2006) [MN Arbitrators' Report"], at ¶ 219.

²⁰ [MN] Ex. 1 (Albersheim Direct) at RA-1, part 1.0, page 15.

²¹ MN Arbitrators' Report, at ¶¶ 21-22 (footnote in original; emphasis added).

²² MN Arbitrators' Report, at ¶221.

1 Finally, regarding cost-based rates, the ALJs rejected Qwest's \$200 per day retail
2 tariff rate proposal and said "as to pricing, Eschelon's position should be
3 adopted."²³ The ALJs noted that historically in Minnesota TELRIC rates have
4 been substantially less than Qwest's tariffed rates for similar services, and they
5 found that "Eschelon's proposal for an interim rate of \$100 is appropriate."²⁴ The
6 ALJs agreed with Eschelon that a TELRIC study should be done.²⁵

7 The ALJs disagreed with Eschelon on one point. For purposes of the new ICA
8 going forward, the ALJs found that that "it appears" that the circumstances under
9 which Qwest offers exceptions to charging an additional fee for expedites (under
10 emergency conditions) is not discriminatory.²⁶ The ALJs found that "on this
11 point, Qwest's position and language should be adopted."²⁷ In response, Eschelon
12 has offered in its Exception on this one point to the ALJs' Report (and to Qwest)
13 alternative modified ICA language for the new ICA that provides that -- if Qwest
14 does provide exceptions to charging an additional fee for expedites for its retail
15 customers -- it will likewise provide those exceptions for CLECs when the same
16 conditions are met. After all, Qwest may have few or no exceptions in its retail
17 tariff while the arbitrations are pending but shortly afterward could introduce
18 exceptions for emergency conditions for additional retail customers. The new
19 contract language should account for that possibility going forward.

²³ MN Arbitrators' Report, at ¶¶ 221-222.

²⁴ MN Arbitrators' Report, at ¶ 222.

²⁵ MN Arbitrators' Report, at ¶ 222.

²⁶ MN Arbitrators' Report, at ¶ 219.

²⁷ MN Arbitrators' Report, at ¶ 220.

1 Although the ALJs in Minnesota suggest that an expedite for a non-design service
2 may be more involved than an expedite for a designed service,²⁸ the evidence in
3 this case shows that Qwest had been offering emergency-based expedite for both
4 design and non-design facilities for many years, and the “complexity” of design
5 facilities had not been an issue for all these years. Qwest argues in this case that a
6 “design service is a more complex service.”²⁹ Qwest did not explain why
7 *complexity of design facilities* necessarily means *complexity of expedites for*
8 *design facilities*. Further, in Washington, Qwest continues to offer emergency
9 expedites for loops as well as for its retail services.³⁰ Certainly the provisioning
10 of loops is no more complex in Arizona than it is in Washington. Finally, Qwest
11 does not explain how these complexities can possibly justify a rate difference of
12 \$200 per day.

13 As I discuss above, the ALJs agreed with Eschelon on the latter point and rejected
14 Qwest’s \$200 per day proposed rate. Therefore, although the adoption of the
15 ALJs’ recommendations in Minnesota would mean fewer exceptions or no
16 exceptions to charging an additional expedite fee for emergency conditions, the

²⁸ MN Arbitrators’ Report, at ¶ 220.

²⁹ Martain Direct, p. 33, line 22; *see also* Albersheim Direct, p. 4, lines 2, 6, 14.

³⁰ *See* Exhibit BJJ E, Qwest’s PCAT, *Expedites and Escalations Overview* (“The Expedites Requiring Approval section of this procedure does not apply to any of the products listed below (*unless you are ordering services in the state of WA*)) and (“The Pre-Approved expedite process is available in *all states except Washington* for the products below when your ICA contains language for expedites with an associated per day expedite charge.”) (emphasis added). Qwest has a UNE tariff in Washington that contains approved rates. Qwest has not received Commission approval for a UNE \$200 per day advanced rate in Washington. After input from Washington staff, Qwest withdrew proposed tariffs in Washington containing its non cost based \$200 per day rate. (Docket Nos. UT-041886; UT-041890; withdrawn Nov. 18, 2004, *see* <http://tabb.qwest.com/PPNB.NSF/JobNum?OpenView&Start=1&Count=50&Expand=19#19>)

1 charge for each and every expedite will be substantially lower than Qwest's non
2 cost based proposed rate.

3 **Q. EVEN ASSUMING *ARGUENDO* THAT THE CIRCUMSTANCES UNDER**
4 **WHICH QWEST CURRENTLY OFFERS EXCEPTIONS TO CHARGING**
5 **AN ADDITIONAL EXPEDITE FEE UNDER EMERGENCY**
6 **CONDITIONS WERE NONDISCRIMINATORY, WOULD THAT**
7 **CHANGE THE RESULT IN THIS CASE UNDER THE STAFF'S**
8 **CONCLUSIONS?**

9 **A.** No. Staff does not support a finding of discrimination on this point in this case.³¹

10 Without a finding of discrimination, and based on the facts of this case under the
11 existing Commission-approved Qwest-Eschelon ICA, Staff concluded that:

12 Qwest did not adhere to the terms and conditions of the current
13 Qwest-Eschelon Interconnection Agreement, which allows
14 Eschelon the capability to expedite orders when Qwest denied this
15 option without signing an amendment to the Agreement. Qwest
16 should continue to support the same Expedite Process that has been
17 used in the past for all products and services (including unbundled
18 loops) if the order meets any of the Emergency criteria or
19 conditions or where the customer's safety may be an issue if the

³¹ Staff Testimony, p. 32, line 21. Staff concludes that there is no retail analogue for expedites of loop installations. *Id.* p. 32, lines 21-23. When there is no retail analogue, "no retail analogue" does not mean "no discrimination." An analysis must be made of whether the access the ILEC provides to CLECs offers a meaningful opportunity to compete. *See* Bell Atlantic NY 271 Order at ¶ 44. In any event, Qwest has now admitted that there is a retail analogue for DS1 and DS3 loops. *See* Albersheim Direct, p. 12, lines 18-19 ("DS1 Capable Loops and DS3 Capable Loops have a retail analogue; specifically, DS1 and DS3 private lines respectively"). Qwest currently does not provide expedite capability for DS1 Capable Loops and DS3 Capable Loops under the existing ICA at all, much less in the same time and manner as it provides expedite capability for private lines.

1 Expedite process is not processed. No additional charge should be
2 applied beyond the standard installation charge.³²

3 Eschelon asks the Commission to adopt this conclusion.

4 **B. THE INTERCONNECTION AGREEMENT TERMS, AS WELL AS**
5 **THE CMP DOCUMENT TERMS, SUPPORT THE STAFF'S**
6 **CONCLUSIONS.**

7 **Q. QWEST ARGUES THAT ITS CHANGES DO NOT VIOLATE THE ICA.³³**
8 **DO YOU AGREE, AND DOES THE EXISTING QWEST-ESCHELON ICA**
9 **ALLOW QWEST TO REFUSE TO PROVIDE SERVICE UNTIL**
10 **ESCHELON AGREES TO A NON COST BASED RATE?**

11 **A.** No. I agree with Staff's conclusion that: "Here there was clearly a change to the
12 Expedite Process that abridged Eschelon's rights under its existing
13 Interconnection Agreement."³⁴ Qwest's own CMP Document provides that, when
14 conduct in CMP abridges the rights of a party to an ICA, the ICA prevails.³⁵
15 Eschelon's interconnection agreement with Qwest, which requires compliance
16 with state and federal law,³⁶ states that Qwest "shall" provide Eschelon with "the

³² Staff Testimony, Executive Summary, Staff Conclusion No. 1.

³³ Albersheim Direct, p. 18, lines 1-3.

³⁴ Staff Testimony, p. 34, lines 5-6; *see also id.* Executive Summary, Staff Conclusion No. 1.

³⁵ Qwest CMP Document, §1.0 [Exhibit BJJ A-9 (000173)] ("If changes implemented through this CMP do not necessarily present a direct conflict with a CLEC interconnection agreement, but would abridge or expand the rights of a party to such agreement, the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such agreement.").

³⁶ *See, e.g.,* Exhibit DD-3 (Excerpts from Qwest-Eschelon ICA), Part A, §24.3: "All terms, conditions and operations under this Agreement shall be performed in accordance with all applicable laws, regulations and judicial or regulatory decisions of all duly constituted governmental authorities with appropriate jurisdiction, and this Agreement shall be implemented consistent with the FCC Interconnection Order and any applicable Commission orders."

1 capability to expedite a service order³⁷ and obligates Qwest to charge cost-based
2 rates.³⁸ The ICA specifically provides that Qwest “shall not discontinue or refuse
3 to provide *any* service” required under the agreement without an amendment to
4 the agreement.³⁹ That is exactly what Qwest is doing, however. Qwest is
5 refusing to provide the contractually required expedite capability as a means to
6 force⁴⁰ Eschelon to pay an unapproved non cost based rate of \$200 per day, in
7 violation of the ICA.

8 For almost six years (from April 28, 2000 through approximately January 2,
9 2006), Qwest and Eschelon operated under a mutually agreed upon process
10 pursuant to which Qwest provided expedites at no additional charge when certain
11 emergency conditions were met.⁴¹ Qwest provided expedited order capability for
12 all types of unbundled loops (as well as other products).⁴² Despite Qwest’s
13 providing expedited loop orders for almost six years under the ICA, Ms.
14 Albersheim now states that “there is no explicit statement that expedites will be

³⁷ Exhibit DD-3 (Excerpts from Qwest-Eschelon ICA), Att. 5, §3.2.2.13.

³⁸ See, e.g., Exhibit DD-3 (Excerpts from Qwest-Eschelon ICA), Att. 3, §2.1 provides that Qwest will provide Eschelon with Network Elements “on an unbundled basis on rates, terms and conditions that are just, reasonable, and non-discriminatory in accordance with the terms and conditions of this Agreement.” Section 252(d)(1) of the Act provides that “Determinations by a State commission of the just and reasonable rate for . . . network elements for purposes of subsection (c)(3) of” section 251 of the Act shall be based on cost. See 47 U.S.C. §252(d)(1)(A)(i).

³⁹ Exhibit DD-3 (Excerpts from Qwest-Eschelon ICA), Scope, ¶ I (emphasis added).

⁴⁰ See Staff Testimony, p. 34, lines 11 & id. p. 36, line 21 – p. 37, line 2.

⁴¹ See Exhibit BJJ D (Examples of Expedite Requests Approved by Qwest for Unbundled Loop Orders).

⁴² Answer, Page 9 ¶ 14 Lines 24-25 (“Qwest previously expedited orders for unbundled loops on an expedited basis for Eschelon”); see also Exhibit BJJ D (Examples of Expedite Requests Approved by Qwest for Unbundled Loop Orders).

1 provided for unbundled loops in Eschelon's current contract."⁴³ The ICA terms
2 have not changed. They are the same now as when Qwest was expediting loop
3 orders under the ICA. The contractual requirement to provide expedite capability
4 is in Attachment 5 (Business Process Requirements), which applies to all products
5 and services, and no exception is made for loops. Section 3.2.2.13 of Attachment
6 5 provides that Qwest shall provide the capability to expedite a "service order,"
7 and loops are ordered on a "service order," as that term is used in the ICA.
8 Moreover, the ICA expressly refers to expedited service in the context of
9 coordinated cutovers – an unbundled loop activity. Section 3.2.2.5 of Attachment
10 5 (with emphasis added) states: "For Customer conversions requiring coordinated
11 cut-over activities," Qwest and CLEC will agree on a scheduled conversion time
12 and that, "*unless expedited*," Qwest and CLEC "shall schedule the cut-over
13 window at least forty-eight (48) hours in advance." If the loop order was
14 expedited so loop delivery was scheduled to occur within one day, for example,
15 obviously the cut-over window would not be scheduled 48 hours in advance. This
16 explicitly shows that expedites will be provided for unbundled loops under
17 Eschelon's current contract.

18 The mutually agreed upon process was in place under the ICA before it was ever
19 discussed in CMP and before Qwest documented it on its website. Therefore, it
20 was inaccurate for Qwest to represent that "it previously expedited orders for
21 unbundled loops on an expedited basis for Eschelon pursuant to the expedite

⁴³ Albersheim Direct p. 15, footnote 17.

1 process *then in effect, which process was also created in the Commission-*
2 *approved Change Management Process.*⁴⁴ In 2000, when Qwest and Eschelon
3 operated under the mutually agreed upon process for obtaining expedites at no
4 additional charge when the emergency conditions were met, no CMP activity had
5 taken place on this issue. Qwest now admits that the expedite terms regarding
6 emergency conditions were not developed “from the start through the CMP
7 process.”⁴⁵

8 On September 22, 2001 – when the companies had been operating under the
9 existing ICA for more than a year – Qwest issued a product notification indicating
10 that Qwest had updated its website on methods and procedures for Expedites and
11 Escalations to document the definition of expedite and valid expedite reasons (*i.e.*,
12 the emergency conditions).⁴⁶ This was not a change request or change in
13 process. Qwest specifically recognized in the product notification that “these
14 updates reflect current practice.”⁴⁷ Qwest also admits that it “expedited orders for
15 unbundled loops” under these existing terms.⁴⁸

⁴⁴ Answer ¶16, lines 17-20 (emphasis added). *See also* Transcript of Procedural Conference in this matter (July 27, 2006), p. 16, lines 22-25 (Mr. Steese) (“And Qwest has a process in place for expediting unbundled loops and it was created in the change management process, and there's really no dispute about that.”). *Cf.* Eschelon's Objections and Responses to Qwest's First Set of Data Requests (June 8, 2006), pp. 7-6 & Document Nos. 000022-000025 (showing expedite process under ICA was not created in CMP).

⁴⁵ Martain, p. 18, lines 26-27.

⁴⁶ *See* Exhibit BJJ A-1 at 000022-000025 - Product Notification for Version 1 of the Expedites & Escalations Overview in PCAT.

⁴⁷ *See id.* at Document No. 000022.

⁴⁸ Answer, Page 9 ¶ 14 Lines 24-25 (“Qwest previously expedited orders for unbundled loops on an expedited basis for Eschelon”).

1 Q. QWEST INDICATES THAT LATER CHANGES TO THE EXPEDITE
2 PROCEDURES WERE DEVELOPED IN CMP WITH ESCHELON'S
3 APPARENT CONSENT.⁴⁹ IS MUTUAL CONSENT SIGNIFICANT
4 UNDER THE EXISTING ICA?

5 A. Yes. The ICA specifically provides that any expedite procedures must be
6 "*mutually* develop[ed]."⁵⁰ As to all but the rate⁵¹ and the two changes identified
7 in Eschelon's dispute resolution letter (Qwest-initiated PCAT Versions 27 and
8 30),⁵² Qwest admits implicitly that their development was *mutual*, as required by
9 the contract. The following Qwest testimony, for example, shows that Qwest
10 recognizes the distinction between *mutually* developed terms (with agreement or
11 no objection) and terms that are *not* mutually developed (implemented over
12 objection):

13 for years Eschelon accepted and took advantage of the changes⁵³
14 made in CMP to the process for expediting orders for unbundled

⁴⁹ Martain, pp. 19-21 & 31.

⁵⁰ Exhibit DD-3 (Excerpts from Qwest-Eschelon ICA), Att. 5, §3.2.2.12.

⁵¹ Qwest has to admit the well documented fact that rates and the application of rates are outside the scope of CMP. See Martain Direct, p. 2, line 39. If one reviews Qwest's conduct in this case, however, Qwest specifically mandated in its PCAT that an ICA "must contain" a "per day" rate structure. See Exhibit BJJ A-6 at 000107. How a rate is structured is a cost docket issue; not a CMP issue.

⁵² Exhibit BJJ A-7 at (April 3, 2006 dispute resolution letter) (with the subject line identifying the Joint McLeod-Eschelon Escalation of Version 27 changes and Eschelon's 11/305 objections to Version 30 changes as subjects of the dispute resolution).

⁵³ Although Qwest claims that Eschelon "took advantage" of the changes, Eschelon could not take "advantage" of the fee-added process because Qwest would not apply a cost-based rate or negotiate any rate other than its unilaterally imposed rate of \$200 per day. The ICA requires Qwest to provide expedite capability and says that Qwest "may charge" to do so. See Att. 5, §3.2.4.2.1. Still, Qwest would not (and will not) expedite any loop order, even though Eschelon was (and is) willing to pay cost based rates. See Exhibit BJJ A-7 at 000137-000138 (Eschelon April 3, 2006 dispute resolution letter confirming Eschelon would pay Commission-approved rates per the contract); see also Attachment 1 to Staff Testimony (Eschelon Chronology), p. 3

1 loops. It accepted all of these changes and did not assert that any
2 were in violation of its ICA until recently. Version 27 contained
3 the first change that Eschelon objected to.⁵⁴

4 Staff recognized that, when Qwest implements a change over CLEC objection, it
5 is not a mutually developed procedure under the ICA:

6 This change was represented by Qwest as an optional process
7 which would not abridge CLEC's rights under their current
8 Interconnection Agreements. Clearly, this was not the case when
9 Qwest implemented the process *under objections*.⁵⁵

10 Qwest's suggestion that CMP is an all-or-nothing proposition under which
11 Eschelon must accept all changes implemented by Qwest or none directly
12 conflicts with the ICA's provision that only procedures that are mutually
13 developed apply under the ICA.

14 **Q. DOES QWEST'S ALL-OR-NOTHING APPROACH TO A CLEC'S USE**
15 **OF CMP ALSO CONTRADICT QWEST'S OWN CMP DOCUMENT?**

16 **A.** Yes. Irrespective of a CLEC's level of participation in CMP, the CMP Document
17 provides that some CMP changes, which are within the scope of CMP and do not
18 conflict or abridge a CLEC's ICA, may apply to a CLEC, while other changes,
19 which are not within the scope of CMP and/or conflict or abridge a CLEC's ICA,

(#14) (Eschelon even offered to pay Qwest's proposed rate to obtain an expedite under the ICA in the individual rehabilitation center example to restore service to the customer). Eschelon is willing to pay; Qwest refuses to abide by the contractual and statutory requirements to charge cost based rates. See Exhibit DD-3 (Excerpts from Qwest-Eschelon ICA), Att. 3, §2.1; 47 U.S.C. §252(d)(1)(A)(i).

⁵⁴ Martain, p. 31, lines 23-28 (footnote added).

⁵⁵ See also Staff Testimony, p. 34 (lines 8-10) (emphasis added).

1 do not apply to the CLEC.⁵⁶ In the latter cases, the CMP Document clearly
2 provides that the ICA governs.⁵⁷ Here, Section 3.2.2.12 of Attachment 5 of the
3 ICA requires mutual development of expedite procedures, and Qwest is
4 attempting to impose on Eschelon terms that Qwest implemented over Eschelon's
5 objection (*i.e.*, not mutual) in violation of that express ICA provision.

6 CLEC CMP participants are largely operational personnel. During the
7 development ("Redesign") of CMP (formerly known as CiCMP), New Edge
8 expressed concern that operational personnel may not be familiar with laws and
9 contract terms. Qwest assured New Edge and CLECs that this would not be a
10 problem, because language was being added to ensure that, in cases of conflict,
11 the ICA controls. Specifically, the following exchange took place on the record:

12 MS. BEWICK [New Edge]: A quick question: Is part of the
13 discussion going to revolve around -- the issue of what generally is
14 happening in CiCMP revolves around, a lot of time, technical
15 specific type issues that are being changed and how that relates to
16 the regulatory, legal type processes; sort of that gap of CiCMP is
17 designed, as I understand it, predominantly to be addressing
18 operational issues, but sometimes the end result of what can come
19 out of that process can make a change that impacts an ICA or
20 something like that. And we may not have the people who can
21 address that particular decision on those -- in the CiCMP meetings
22 because *you are dealing with operational people*. So is that sort
23 of concept, that gap, being addressed anywhere in this redesign
24 look?

25 MR. CRAIN [Qwest]: I would say it's addressed in two ways:
26 First of all, it has been addressed in these workshops by inserting
27 language into the SGAT that indicated that the contract language

⁵⁶ CMP Document, Section 1.0 (Scope), Qwest Exhibit JM-D1 & Eschelon Exhibit BJJ A-9.

⁵⁷ See *id.*; see also Staff Testimony, p. 9, line 10 -- p. 10, line 4 & p. 34, lines 1-7; MN ALJs' Report, ¶¶21-22 (quoted above).

1 controls over anything that could come out of the Change
2 Management Process -- *a contract is a contract*, and I believe
3 that's the same for any other ICA, as well.⁵⁸

4 **Q. DOES QWEST FULLY ACKNOWLEDGE THAT THE CMP DOCUMENT**
5 **PROVIDES THAT THE ICA SHALL CONTROL?**⁵⁹

6 A. Although Qwest quotes the Scope language of the CMP Document and
7 acknowledges that CMP should not "be used as a mechanism to subvert
8 commitments established via Interconnection Agreements,"⁶⁰ Ms. Albersheim
9 then goes on to claim "But the converse should also be true."⁶¹ Given the very
10 clear directive set forth in the CMP Document that, in cases of conflict between
11 the ICA and CMP, the ICA controls, the converse -- *i.e.*, in cases of conflict
12 between an ICA and the CMP, the CMP governs -- cannot also be true. It would
13 directly contradict the express provision found in the CMP Document,⁶² the
14 SGAT,⁶³ and the ICA.⁶⁴

15 Also, that the converse was not intended is shown by the CMP Redesign
16 documentation leading to adoption of the scope language. That documentation,
17 which is attached to the testimony of Ms. Johnson,⁶⁵ indicates that the parties to

⁵⁸ Transcript of 271CMP Workshop Number 6, Colorado Public Utilities Commission Docket Number 97I-198T (Aug. 22, 2001), p. 291, line 17 -- p. 292 line 13 (Andrew Crain of Qwest) (quoted in Exhibit BJJ-26, p. 3) (emphasis added).

⁵⁹ Albersheim Direct Testimony at p. 24, lines 22-23.

⁶⁰ Albersheim Direct Testimony at p. 24, lines 10-21.

⁶¹ Albersheim Direct Testimony at p. 24, lines 21-22.

⁶² Martain Direct Testimony, Exhibit JM-D2 (CMP Document) at § 1; see also § 5.4.

⁶³ SGAT, §2.3 & Exhibit G, §1.0 & §5.4.

⁶⁴ ICA §2.3 & Exhibit G, §1.0 & §5.4.

⁶⁵ Exhibit BJJ G.

1 the CMP Redesign identified gaps in Qwest's CMP that needed to be corrected to
2 meet Qwest's obligation to provide CMP before obtaining 271 approval. Qwest
3 created a "Gap Analysis" matrix listing these gaps and assigning them gap
4 analysis numbers.⁶⁶ Eschelon identified, as a gap, the need for CMP to account
5 for differences in individual CLEC ICAs. It appears as gap analysis number 150
6 in the posted CMP Redesign matrix:

7 Qwest needs to establish and document a process to account for
8 individual interconnection agreements ("ICAs") when
9 implementing changes and using the Change Management Process
10 ("CMP"). Qwest needs to ensure that ICAs are not unilaterally
11 modified.

12 In Colorado, as quoted above, Qwest said "the contract language controls over
13 anything that could come out of the Change Management Process -- a contract is a
14 contract, and I believe that's the same for any other ICA, as well."⁶⁷ The CMP
15 Redesign Gap Analysis quoted this Qwest commitment and identified the gap to
16 be addressed in CMP Redesign as follows:

17 Qwest needs documented processes and checks and balances in
18 place to ensure that Qwest can implement this concept and account
19 for differences in ICAs (including ICAs not based on SGATs).
20 The experience to date shows that Qwest's structure anticipates

⁶⁶ Exhibit BJJ G January 22-24, 2002 CMP Redesign Minutes (Att. 9, excerpt from Gap Analysis matrix). Meeting Minutes available on Qwest's website, *see*,
http://www.qwest.com/wholesale/downloads/2002/020225/1_CMP_Redesign_Final_Meeting_Minutes_Jan_22-24-02-22-02.doc

⁶⁷ Transcript of 271 CMP Workshop Number 6, Colorado Public Utilities Commission Docket Number 97I-198T (Aug. 22, 2001), p. 292, lines 8-13 (Andrew Crain of Qwest).

1 making global changes and steps need to be developed to account
2 for individual differences before implementation.⁶⁸

3 On April 4, 2002, Gap Analysis Issue #150 was closed in CMP Redesign⁶⁹
4 because language providing that the ICA controls was “inserted into the Scope
5 section” of the CMP Document.⁷⁰ These documents show that CMP was created
6 in a manner to ensure that unwanted global (*i.e.*, uniform) changes would not be
7 forced on CLECs, and that CLECs retained their Section 252 right to negotiate
8 and arbitrate individual contracts with individual differences. Qwest obtained 271
9 approvals after closing this “gap” by providing these assurances to CLECs and
10 Qwest should not be allowed to backslide on this commitment now.

11 **Q. DOES QWEST ATTEMPT TO DOWNPLAY CLEC OBJECTIONS TO**
12 **ITS CHANGES?**

13 A. Yes. Because the contract requires changes to expedite procedures be developed
14 “mutually,”⁷¹ Qwest has an incentive to minimize Eschelon’s actions in CMP and
15 dispute resolution that show that the changes were not mutually agreed upon.
16 Initially, Qwest went so far as to tell the Commission that Eschelon “did
17 nothing.”⁷² As that claim is unsupportable on the documented facts,⁷³ Qwest now

⁶⁸ *Id.* Att. 9, pp. 99-100 (Gap Analysis issue #150) (footnote to CO 271 transcript in original).

⁶⁹ Related Action Item #227 (to “clarify SGAT language on CMP in sections 2.3.1 and 12.2.6, in addition, add language that states that CMP will not supersede and ICA”) was also closed.

⁷⁰ Exhibit BJJ H April 2-4, 2002 CMP Redesign Minutes, p. 15; Att. 6 (Action Items Log, #227, pp. 167-168 & Att. 12).

⁷¹ Exhibit DD-3 (Excerpts from Qwest-Eschelon ICA), Att. 5, §3.2.2.12.

⁷² Answer, p. 10, ¶B, line 25. Qwest went from claiming that Eschelon did nothing for “18 months” (Answer p. 10, ¶B, line 22) to its current claim of “2 ½ months” (Martain, p. 5, lines 7-8 & p. 26, line 22).

1 focuses on what Eschelon did not do⁷⁴ (even though those actions are optional)⁷⁵
2 rather than on the objections actually made by Eschelon. A summary of steps
3 taken by Eschelon to object in CMP and under the ICA is provided in Exhibit
4 BJJ-K.

5 Qwest makes some pretty fine distinctions to try to create an impression that there
6 were not strong objections to its actions in CMP. For example, Qwest states that
7 the “only CLEC who to my knowledge has disputed V30 *in any way* is
8 Eschelon.”⁷⁶ Apparently “in any way” is limited to Qwest’s narrow definition of
9 “disputing” and does not apply to clear CLEC protests to Qwest’s conduct in
10 written CMP comments. Posted on Qwest’s own web site are objections by
11 several CLECs to Qwest’s Version 30 changes.⁷⁷ For example, three CLECs
12 (including Eschelon) providing comments on Version 30 in CMP referred to
13 discrimination and/or a competitive disadvantage. Eschelon stated that the
14 change Qwest is proposing is “discriminatory to CLECs and CLEC customers.”⁷⁸
15 McLeod stated: “Qwest’s removal of the 2w/4w analog loop exception from the
16 Expedites Requiring Approval process places CLECs at a competitive

⁷³ See, e.g., Exhibit BJJ A-7 at 000118 (McLeodUSA CMP escalation of Qwest-initiated Version 27 notification) & 000120 (Qwest email confirming “Eschelon did join the escalation”); BJJ Att. A-7, at 000124-000126 (Eschelon’s written objections to Qwest-initiated Version 30 notification); see also Exhibit BJJ-K.

⁷⁴ See, e.g., Martain p. 32, lines 4-5.

⁷⁵ See Exhibit BJJ-P (which includes a summary of the dispute resolution procedures in the CMP Document).

⁷⁶ Martain p. 27, lines 10-11 (emphasis added).

⁷⁷ Exhibit BJJ A-7 at 000123-000128.

⁷⁸ Exhibit BJJ A-7 at 000126.

1 disadvantage.”⁷⁹ PriorityOne Telecommunications, Inc stated that it “objects to
2 Qwest’s proposed changes due to feeling that it is discriminatory to CLEC’s and
3 CLEC customers.”⁸⁰ Ms. Martain admits that “some CLECs expressed
4 dissatisfaction on the ad-hoc call” but does not even mention these written
5 objections in this response.⁸¹ However, Ms. Albersheim acknowledged, at the
6 arbitration hearing in Minnesota, that Qwest proceeded with its changes even
7 though they were not supported by any CLEC.⁸²

8 In CMP, Eschelon objected to Qwest’s Version 30 change and joined McLeod’s
9 escalation of Qwest’s Version 27 change.⁸³ Although Qwest suggests that
10 Eschelon could have taken other steps in CMP (Oversight Committee,⁸⁴
11 postponement, escalation),⁸⁵ those steps are not required by the CMP Document,
12 under which they are clearly optional. A summary of the terms of the CMP
13 Document (showing additional steps are not required) is attached to the testimony
14 of Ms. Johnson as Exhibit BJJ-P. Nor are they required under the ICA (which

⁷⁹ Exhibit BJJ A-7 at 000126.

⁸⁰ Exhibit BJJ A-7 at 000126.

⁸¹ Martain Direct, p. 27, lines 3-4; *see also id.* lines 1-12.

⁸² *In the Matter of the Petition of Eschelon Telecom, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996*, Minnesota Public Utilities Commission Docket No. P-5340, 421/IC-06-768, Hearing Transcript, Vol. 1, at p. 26, line19-p. 27, line 18.

⁸³ Exhibit BJJ A-7 at 000124-000126 (Eschelon objections in CMP to Version 30 changes), 000118 (McLeodUSA’s escalation in CMP of Version 30 change), 000120 (Qwest email confirming “Eschelon did join the escalation”). *See also* Exhibit BJJ-K.

⁸⁴ As the name “Oversight” suggests, Section 18.0 of the CMP Document indicates that it applies to issues raised with “using this CMP.” *See* Exhibit BJJ A-9; Exhibit JM-D2. Section 18.0 of the CMP Document not only provides that it is “optional,” but also that: “It will not be used when one or more processes documented in this CMP are available to obtain the resolution the submitter desires.” *Id.*

⁸⁵ Martain, p. 27, lines 6-7 & p. 32, lines 4-5.

1 does not even reference CMP). The ICA requires mutuality in the development of
2 expedite procedures, and Eschelon clearly communicated its objections to Qwest.
3 Qwest knew it was not implementing these changes as to Eschelon based on any
4 kind of mutual agreement. Without mutual agreement, Qwest could not
5 consistent with the ICA refuse to provide expedite capability for loops to
6 Eschelon under the ICA.

7 **Q. MS. MARTAIN TESTIFIES THAT ESCHELON'S DISPUTE "WAS NOT**
8 **MADE AS PART OF THE CMP PROCESS."**⁸⁶ **PLEASE RESPOND.**

9 **A.** Qwest's claim doesn't make sense. To the extent that Qwest is indicating that a
10 dispute resolution has to involve multiple CLECs to be considered a CMP dispute
11 resolution (as Qwest suggested in the Minnesota Qwest-Eschelon arbitration),⁸⁷
12 that is not required by the CMP Document, and it is inconsistent with Qwest's
13 previous responses to Eschelon requests to involve other CLECs in resolution of
14 issues. A summary of the CMP Document's dispute resolution procedures, and of
15 Qwest's previous responses, is provided in Exhibit BJJ-P.

16 In the case of this Eschelon Complaint, Eschelon made its objections in CMP and
17 then in an Eschelon dispute resolution letter expressly identified Qwest's Version
18 27 and Version 30 Expedite PCAT CMP changes as subject to the dispute

⁸⁶ Martain, p 27 line 12; *see also id.* p. 27, lines 15-17 (claiming that Eschelon did not choose to use the CMP dispute resolution process).

⁸⁷ Qwest-Eschelon MN ICA Arbitration, Albersheim MN Direct, p. 27, lines 13-22.

1 resolution.⁸⁸ Eschelon's Complaint is a CMP dispute resolution, as well as a
2 dispute resolution under the ICA.⁸⁹ Section 15.0 of the CMP Document clearly
3 anticipates this sort of action when it states that an individual CLEC may bring
4 any dispute from CMP to the Commission. Eschelon also brought the dispute
5 pursuant to its ICA. Eschelon raised both issues in its Complaint, as well as the
6 particular rehabilitation center example.⁹⁰ For example, Eschelon's Complaint in
7 this matter states:

8 Qwest claims that it may ignore its obligation to expedite
9 unbundled loop orders under the Commission approved ICA
10 because Qwest, through its Change Management Process
11 ("CMP"), changed its generic wholesale product catalog
12 ("PCAT"), over the objection of multiple CLECs. Qwest changed
13 the PCAT to indicate that Qwest need not provide expedited orders
14 for any unbundled loops, even when the CLEC's ICA has language
15 supporting expedites. Although the Commission has approved
16 rates that are structured as hourly and non-recurring charges,
17 Qwest's revised PCAT provides that the rate must be structured as
18 a per day charge for each day the order is expedited. Because
19 Qwest has not brought any such per day charge to the Commission
20 for approval, Qwest requires an ICA amendment to charge such a
21 rate. Qwest neither obtained Eschelon's consent to such an
22 amendment nor attempted to request approval from this
23 Commission.

24 Eschelon's right to obtain expedites under the Commission
25 approved ICA at Commission approved rates and under
26 nondiscriminatory terms cannot be modified or changed by
27 Qwest's unfiled PCAT. Qwest ignores this Commission's

⁸⁸ Exhibit BJJ A-7 at 000137 (April 3, 2006 dispute resolution letter) (with the subject line identifying the Joint McLeod-Eschelon Escalation of Version 27 changes and Eschelon's 11/305 objections to Version 30 changes as subjects of the dispute resolution).

⁸⁹ Exhibit BJJ A-7 at 000130 (March 21, 2006 dispute resolution letter) (citing ICA Section 27.2, the dispute resolution provision of the ICA); *see also* Exhibit BJJ A-7 at 000137 (April 3, 2006 dispute resolution letter) (with the subject line indicating Eschelon's dispute resolution request included "Dispute Resolution pursuant to the Interconnection Agreements").

⁹⁰ Complaint, ¶¶22-41.

1 authority to approve ICA terms and its authority to set and approve
2 rates and charges. The Commission approved ICA controls, and
3 Qwest must expedite unbundled loop orders and perform repairs
4 for Eschelon pursuant to the ICA and in a nondiscriminatory
5 manner.⁹¹

6 Eschelon properly raised these issues with the Commission in its Complaint, as
7 provided for in the dispute resolution provisions of the CMP Document (Section
8 15.0) and the ICA (Section 27). Consistent with this, Staff has made conclusions
9 that apply to CLECs with respect to the disputed CMP changes and with respect
10 to Eschelon under its ICA.⁹²

11 **Q. QWEST CLAIMS THAT ESCHELON SHOULD HAVE FILED ITS**
12 **COMPLAINT EARLIER.⁹³ PLEASE RESPOND.**

13 A. Qwest's claim assumes that, at the time it made its CMP changes over Eschelon's
14 objection, Eschelon had the burden of bringing a Complaint. Eschelon, however,
15 had a Commission-approved ICA that requires Qwest to provide expedite
16 capability (and under which Qwest had provided expedites for loops for almost
17 six years) and prohibits Qwest from refusing to provide any service under the ICA
18 without mutual agreement. As Eschelon had objected in CMP, Qwest *knew* there
19 was no mutual agreement to change the ICA terms and expedite procedures.
20 Qwest also *knew* that the CMP Document provides that, when a CMP change
21 conflicts with or abridges the terms of an ICA, the ICA controls. Although Qwest

⁹¹ Complaint, p. 2, line 17 – p. 3, line 6.

⁹² Staff Testimony, Executive Summary.

⁹³ Martain p. 27, lines 13-18; Novak, pp. 7-8.

1 argues that Eschelon should have acted earlier because Qwest's position in CMP
2 was "well known,"⁹⁴ the more important point is that *Qwest knew* of the ICA
3 terms and Qwest's commitment that, despite any changes in CMP, the ICA
4 controls. In other words, Qwest is arguing that Eschelon should have known that
5 Qwest would steadfastly and repeatedly ignore these obligations and should have
6 filed a Complaint in anticipation of such conduct by Qwest.

7 After a number of requests by Eschelon for expedites, it became clear to Eschelon
8 that this was not a Qwest compliance problem but a Qwest policy. Without a
9 number of denials of requests based not on whether the emergency conditions
10 were met but simply due to Qwest's legal argument,⁹⁵ if Eschelon had filed a
11 Complaint earlier, Qwest may have argued that these were isolated incidents; that
12 Eschelon was being unfair and premature; or that Eschelon had insufficient
13 evidence that Qwest would not abide by the ICA terms and the CMP Scope
14 provision or that doing so would cause any harm. The severity of the particular
15 rehabilitation center example, involving serious 911 issues, compelled action. In
16 particular, this example showed Qwest will impose its position that it can
17 unilaterally breach a six-year mutually agreed upon term under the ICA, and

⁹⁴ Novak Direct, p. 7, line 18; *see also id.* pp. 7-8.

⁹⁵ *See* Novak, p. 2, lines 18-20 ("On each occasion, Qwest informed Eschelon that it would not fulfill the expedite request because Eschelon's ICA did not contain a rate to expedite orders."); *see also id.* p. 7, lines 21-22.

1 create a required "per day" rate structure, without filing anything with the
2 Commission or gaining its approval.⁹⁶

3 Although Qwest stated its policy in CMP, it remained to be seen whether Qwest
4 would apply a policy that conflicted with Eschelon's ICA to Eschelon, despite the
5 CMP Document's language to the contrary. Qwest sometimes indicates that it
6 *will require a contract amendment* when in fact it does not or should not. For
7 example, Qwest suddenly stopped processing Eschelon orders in Arizona for
8 unbundled loop conversions, telling Eschelon that Qwest required a contract
9 amendment for coordinated installation options before Qwest would process any
10 more of these orders.⁹⁷ Only after Eschelon escalated (relying on its existing
11 ICA)⁹⁸ did Qwest re-start processing these types of loop orders, *without a*
12 *contract amendment*. In another example, although Eschelon has a right to order
13 UNE Combinations under its existing agreement, Qwest nonetheless told
14 Eschelon that it would not accept orders for UNE Combinations (specifically,

⁹⁶ This is not the first time Qwest has done so. Its actions here, for example, are similar to those rejected by this Commission in the Qwest 271 proceeding. Qwest is on notice through these documents and that proceeding that it should not have implemented such a change without first seeking Commission approval. *See, In re. US West Communication, Inc.'s, Compliance with Section 271 of the Telecommunications Act of 1996*, ACC Docket No. T-00000A-97-0238, Decision No. 66242, ¶109 (Sept. 16, 2003).

⁹⁷ E.g., Email from Qwest (Cindy Buckmaster) to Eschelon (including Bonnie Johnson) (Feb. 28, 2001) ("I have advised your Account Manager – Judy Rixe, that you will need an amendment to permanently add these options to your profile.").

⁹⁸ *See, e.g.*, Qwest-Eschelon ICA, Att. 5, §3.2.2.5 ("For Customer conversions requiring coordinated cut-over activities, U S WEST and CO-PROVIDER will agree on a scheduled conversion time(s), which will be a designated two-hour time period within a designated date. *Unless expedited*, U S WEST and CO-PROVIDER shall schedule the cut-over window at least forty-eight (48) hours in advance, and as part of the scheduling, U S WEST shall estimate for CO-PROVIDER the duration of any service interruption that the cut-over might cause. The cut-over time will be defined as a thirty (30) minute window within which both the CO-PROVIDER and U S WEST personnel will make telephone contact to complete the cut-over.") (emphasis added).

1 UNE-P) anywhere in its territory, except Minnesota, without a contract
2 amendment.⁹⁹ It later processed UNE-P orders without a contract amendment in
3 Arizona (although in that case, not until after Eschelon raised the issue with the
4 Arizona Commission). Through these types of examples, Qwest was aware of
5 Eschelon's reasonable position that Qwest should not be able to refuse service in
6 violation of the ICA to force Eschelon into ICA amendments. As these examples
7 show, it sometimes remains to be seen after Qwest announces a position whether
8 and when it will apply it.

9 Qwest suggests in this case, however, that its policy prevented it from expediting
10 any loop orders. On March 17, 2006, Qwest (Jean Novak and Chris Siewert) left
11 a voicemail¹⁰⁰ for Eschelon (Rhonda Knudson) in which Ms. Siewert indicated
12 that she understood the rehabilitation center expedite request was "important" and
13 that "you hate to take people out of service."¹⁰¹ Ms. Siewert also indicated that

⁹⁹ "Eschelon's Comments Addressing UNE Combinations," *In the Matter of U S West Communications, Inc.'s Compliance with §271 of the Communications Act of 1996*, AZ Docket No. T-00000A-97-0238 (Sept. 21, 2000), pp. 4-9 (describing Qwest's forcing CLECs into unnecessary contract amendments as "anti-competitive prerequisites").

¹⁰⁰ Exhibit DD-6 (Voicemail unofficial transcription, Document Nos. 000349-000350).

¹⁰¹ Compare Qwest's recognition of the importance of this situation at the time with Qwest's later version of events in which Qwest claims it also denied the expedite because "there was no medical emergency." Novak Direct, p. 12, lines 15-17. This contradicts the voicemail discussion between Ms. Siewert and Ms. Novak in which they recognized the importance of the situation but decided to deny the expedite anyway and demand an unnecessary amendment instead. This also contradicts the reason provided to Eschelon at the time by Ms. Novak in a separate voicemail, in which she stated: "Hi Ronda, this is Jean. I have to deny the expedite. **You do not have an amendment to pay for this expedite and so I cannot, I have to turn it down.** If you would like me to have someone fax an amendment to you, um, we can get that signed by you and by Qwest to expedite this order and then all you would have to do is sup the order and put the appropriate CL for expedite. So let me know what you want to do. Ah, if you want an amendment, um, I will call Josh and have him get one for you. Um, 218.290.9414. Thanks." (emphasis added). (Eschelon had provided a letter from the customer to Ms. Novak in which the customer said: "Our disabled citizens are in jeopardy and could be at great risk without telephone service to be able to

1 she would take additional steps for Eschelon, such as "go in and look" for the
2 disconnect number, apparently to confirm that facilities could be reused. Ms.
3 Novak – who as a Qwest service manager for Eschelon is supposed to be
4 Eschelon's advocate within Qwest – responded "I'm okay with *not doing it*."¹⁰²
5 This conversation, at a minimum, suggests some level of discretion on their part
6 at this point in time as to whether to process Eschelon's expedite request under
7 the ICA.

8 Nonetheless, Qwest argues that Eschelon should have known it needed to raise
9 the issue with the Commission earlier. Qwest contends that, by bringing a
10 Complaint earlier, Eschelon could have avoided the situation in which Qwest
11 refused to restore service to the rehabilitation center serving persons with
12 disabilities while demanding an ICA amendment.¹⁰³ Eschelon addressed this
13 issue in its Complaint:

14 Pursuant to the ICA, Qwest should have restored the Customer's
15 service (either by repair or granting an expedited order), billed any
16 applicable charges and then, if Eschelon disputed any charges,
17 pursued any dispute pursuant to the dispute resolution provisions
18 of the approved ICA. Because Qwest did not do so, the Customer
19 was out of service for a delayed period of time and Eschelon was
20 forced to order a special access private line circuit. Eschelon had
21 to pay the higher Qwest FCC tariffed rate for installation of that

communicate healthcare, urgent care and programmatic needs." (Attachment 8 to Staff
Testimony, Document No. 000354.) Note the absence of any claim by Qwest at the time that this
expedite did not qualify for a medical emergency exception. The only basis provided was Qwest's
legal position that an amendment was now required. See Novak, p. 8, lines 25-26 ("Qwest denied
the request because Eschelon did not have an expedite amendment.").

¹⁰² Exhibit DD-6 (Voicemail unofficial transcription).

¹⁰³ Martain, p. 27, lines 18-20.

1 circuit, instead of obtaining restoration of service under the terms
2 of the ICA approved by this Commission.¹⁰⁴

3 Eschelon also asked Qwest to follow this approach in future cases, to attempt to
4 avoid the necessity of filing a Complaint, but Qwest continues to refuse to provide
5 expedite capability for loops under the ICA.¹⁰⁵

6 **Q. STAFF ALSO COMMENTED ON THIS ISSUE. PLEASE RESPOND.**

7 A. Staff's conclusions are consistent with the above allegation in Eschelon's
8 Complaint. Staff said that Qwest could have used the dispute resolution process
9 in the ICA rather than simply refusing to expedite the order in the rehabilitation
10 center case. Staff said: "Qwest should have expedited the request first and then
11 followed up afterwards with the dispute resolution process. Clearly, [Named
12 Customer]¹⁰⁶ should have been thought of first; especially given the nature of the
13 customer's business."¹⁰⁷

¹⁰⁴ Complaint, p. 2, lines 10-16; see also April

¹⁰⁵ Exhibit BJJ A-7 at 000132: Eschelon March 21, 2006 dispute resolution letter, p. 3 (last full paragraph).

¹⁰⁶ After Eschelon designated the customer name as confidential pursuant to the protective order and the ICA Qwest continues to refer to the customer name throughout discovery and testimony. See also Exhibit DD-9.

¹⁰⁷ Staff Testimony, p. 34, lines 14-21.

1 C. QWEST IS REQUIRED BY THE FEDERAL ACT TO PROVIDE
2 ACCESS TO UNES, WHICH INCLUDES EXPEDITES, AT COST-
3 BASED RATES.

4 Q. QWEST STATES THAT ESCHELON "REFUSED" TO SIGN AN
5 EXPEDITE AMENDMENT.¹⁰⁸ WHAT TERM OF THE ICA DOES
6 QWEST MODIFY WITH ITS GENERIC EXPEDITE AMENDMENT?

7 A. The rate. There is little else in the Qwest expedite amendment, which states that
8 the expedite procedures continue to operate as described in the Qwest PCAT,¹⁰⁹
9 but now CLECs with an amendment pay an unapproved rate of \$200 per day for
10 expedites of unbundled loop orders.¹¹⁰ Despite all the discussion of CMP changes
11 over time, the end result is that the rate to obtain an expedite for loops went from
12 an installation charge with no additional expedite fee to an installation charge plus
13 \$200 per day advanced.

14 Q. QWEST INDICATES THAT IT MADE TARIFF FILINGS IN 2004.¹¹¹
15 WHAT TERM OF THE TARIFF DID QWEST MODIFY WITH ITS 2004
16 TARIFF FILINGS?

17 A. The rate. I have included pages from Qwest's 2004 tariff filings, along with
18 pages from the tariffs before the 2004 modifications (2000 and 2001), in Exhibit
19 DD-7. Very little changes other than the rate. Exhibit DD-7 also includes the

¹⁰⁸ Albersheim Direct p. 17, line 23.

¹⁰⁹ Unlike the existing ICA, Qwest's unilaterally drafted amendment contains no provision for mutuality of development of the applicable terms.

¹¹⁰ See Exhibit DD-5.

¹¹¹ See, e.g., Martain Direct, p. 37, line 23.

1 Transmittal Description and Justification for the Qwest Expedite Order Charge
2 that Qwest filed with the FCC with its federal tariff in 2004.¹¹² It specifically
3 states that the purpose of Qwest's filing was "to revise the Expedited Order
4 Charge application to a per day charge structure."¹¹³ Qwest adds that its
5 customers want "a simpler and easier method to expedite their orders and
6 calculate the cost of that expedite."¹¹⁴ A review of the tariff pages shows that the
7 "simpler and easier method" has nothing to do with the process of how retail
8 customers obtain expedites but rather with how the charge is calculated. As I
9 discuss below, under the former method for calculating the charge, there was
10 some uncertainty as to the rate between \$0 and \$156.63 but it is certain that the
11 charge would not be more than \$156.63 (half of the installation charge). With its
12 2004 filings, Qwest made it more certain by increasing the retail rate to \$200 per
13 day. As discussed below, this is the charge for its retail customers, and not the
14 applicable rate for a wholesale customer.

15 **Q. ARE RATES WITHIN THE SCOPE OF CMP?**

¹¹² Qwest did not provide this transmittal and associated cost information to Eschelon through CMP (though Qwest claims it provided rate information in CMP, *see* Martain Direct, p. 29) or to Eschelon in negotiations. With respect to this case, in a March 21, 2006 letter, Eschelon asked Qwest to provide cost support for its proposed expedite rate. *See* Exhibit BJJ A-7, p. 000132, footnote 1. Eschelon cited 47 CFR §51.301 (*see id.*), which provides in subpart (c)(8)(ii) that it is a violation of the duty to negotiate in good faith for an ILEC to refuse "to furnish cost data that would be relevant to setting rates if the parties were in arbitration." Qwest, however, did not provide this cost information until the companies were in litigation, after which Eschelon found the public copy on the web.

¹¹³ *See* Exhibit DD-7 (paragraph 1 of Qwest Transmittal). *See* Qwest Transmittal No. 202, Description and Justification Qwest Expedite Order Charge, available at: http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/bin/binary_out.pl?70394.

¹¹⁴ *See* Exhibit DD-7 (paragraph 1 of Qwest Transmittal).

1 A. No. Qwest admits that rates and the application of rates are outside the scope of
2 CMP,¹¹⁵ and Staff agrees.¹¹⁶ When McLeod indicated in its escalation of Qwest's
3 Version 27 CMP changes (which Eschelon joined)¹¹⁷ that the effect of Qwest's
4 changes was to make "it almost impossible for McLeodUSA to expedite with
5 such a high charge,"¹¹⁸ Qwest responded:

6 In response to McLeod's concern around costs associated with an
7 expedited request; discussion around rates associated with an
8 Interconnection Agreement are outside the scope of the CMP
9 process.¹¹⁹

10 Qwest did not explain why it could effectuate an increase in the rate through
11 CMP, when CLECs could not object to that result in CMP.¹²⁰ Although Qwest
12 referred to "discussions around rates" and "an Interconnection Agreement,"
13 Qwest said, in its September 15, 2005 initial notice for Qwest's Version 27
14 change: "Customers who currently have an expedite amendment will
15 automatically be included in this change."¹²¹

¹¹⁵ Martain Direct, p. 2, line 39.

¹¹⁶ Staff Testimony, p. 29, lines 4-5.

¹¹⁷ Exhibit BJJ A-7 000120 (Qwest email confirming "Eschelon did join the escalation").

¹¹⁸ Exhibit BJJ A-7 at 000118 (McLeodUSA CMP escalation of Qwest-initiated Version 27 notification).

¹¹⁹ Exhibit BJJ A-7 at 000129 (Qwest CMP Response to McLeodUSA escalation).

¹²⁰ Now, in its direct testimony, Qwest attempts to provide an explanation, claiming that it received questions from the operational CLEC personnel participating in CMP about rates. *See* Martain Direct, p. 39. The scope of the CMP Document may only be changed by a unanimous vote. *See id.* p. 7, line 18. Answering questions by CLEC operational personnel about Qwest's prices does not give Qwest the authority to unilaterally revise the scope of CMP so that it may effectuate a rate change through alleged CMP changes. Qwest admits that rates are outside the scope of CMP and, if it believed these questions were outside the scope, it could have referred the CLEC questions to the Qwest service or sales representatives. Qwest may have chosen to answer the questions in this context for its own convenience in not having to answer it individually elsewhere. In any event, Qwest's choice to respond in CMP does not alter the scope of CMP.

¹²¹ Exhibit BJJ-J (Version 27 September 15, 2005 Qwest notification).

1 Q. DID QWEST OBTAIN ESCHELON'S CONSENT OR SEEK
2 COMMISSION APPROVAL FOR THIS RATE INCREASE?

3 A. No. Although Qwest cited a legal reason for its conduct ("parity"),¹²² Qwest did
4 not seek a change through the change in law provisions, through a request to
5 update its SGAT, a cost case, or any other Commission proceeding. Although the
6 ICA is supposed to govern, one day Eschelon could receive expedited capability
7 for unbundled loops *under its Commission-approved ICA* when the emergency
8 conditions were met for the price of the installation charge, and the next day it
9 could not receive them except at an unapproved rate of \$200 per day that was not
10 in the contract. This rate change occurred as a result of Qwest's CMP activities,
11 as nothing in the ICA changed on that day. Staff hit the nail on the head when it
12 testified:

13 Q. What role did the CMP play in this particular case?

14 A. Qwest has based its position on the CMP.¹²³

15 After January of 2006, Qwest refused to provide expedite capability for loops
16 under the Commission-approved ICA at the previous rate which Qwest had been
17 charging for six years (the installation charge with no separate expedite fee) or at
18 any Commission-approved rate.¹²⁴

¹²² Exhibit BJJ A-7 at 000105 (second paragraph of Summary of Change).

¹²³ Staff Testimony, p. 7, lines 15-16.

¹²⁴ See Exhibit BJJ A-7 at 000137-000138 (Eschelon letter outlining Commission-approved, cost-based rates that Eschelon would pay per the ICA, if Qwest was going to deviate from the terms that had applied for six years under the ICA) & at 000133 (first paragraph) (Eschelon letter indicating Qwest knew at the time of the rehabilitation center example that Eschelon was willing to pay, if Qwest was going to deviate from the terms that had applied for six years under the ICA);

1 **Q. IS ESCHELON'S POSITION THAT QWEST SHOULD CONTINUE TO**
2 **PROVIDE EXPEDITE CAPABILITY FOR LOOPS IN EMERGENCY**
3 **SITUATIONS AT NO ADDITIONAL CHARGE CONSISTENT WITH**
4 **ESCHELON'S POSITION THAT RATES FOR EXPEDITES SHOULD BE**
5 **COST-BASED?**

6 **A. Yes. As discussed, Eschelon continues to pay the installation NRC separate from**
7 the expedite fee. In addition, Qwest provides expedites when the identified
8 emergency conditions are met ("Expedites Requiring Approval") only if resources
9 are available. Regarding Expedites Requiring Approval (but not fee-added Pre-
10 Approved Expedites),¹²⁵ Qwest's PCAT states:

11 Qwest will review your expedited request for resource availability.
12 In some cases, we may contact you to advise resources for expedite
13 are not available or offer an alternate date.¹²⁶

14 Qwest incurs no cost to add resources for expediting an order when the
15 emergency conditions are met. If resources are not available, Qwest simply
16 denies the request.

17 **Q. MS. MILLION TESTIFIES THAT EXPEDITE CHARGES NEED NOT BE**
18 **COST BASED AND SUGGESTS THAT THEY ARE "COMPLETELY**

see also Novak Direct, p. 8, lines 24-25 (Qwest admits it knew at the time that Eschelon was willing to pay).

¹²⁵ Qwest's testimony on this point is inaccurate. Ms. Albersheim testifies that Qwest provides expedites under its fee-added Pre-Approved Expedite process (at \$200 per day) "so long as resources are available." Albersheim Direct, p. 64, lines 7-8. Qwest's own PCAT shows that she has it backwards. Per Qwest's PCAT, the emergency-based Expedites Requiring Approval (at no additional fee) are subject to resource availability; the fee-added Pre-Approved Expedites are not. *See* Exhibit BJJ-N (current Qwest Escalations and Expedites PCAT).

¹²⁶ *See* Exhibit BJJ-N (current Qwest Escalations and Expedites PCAT, discussing emergency-based Expedites Requiring Approval).

1 **SEPARATE” FROM THE WORK THIS COMMISSION HAS DONE IN**
2 **COST DOCKETS.¹²⁷ WAS IT ALWAYS QWEST'S POSITION THAT**
3 **NON COST BASED RATES APPLY AND EXPEDITE CHARGES**
4 **REQUIRE NO COMMISSION APPROVAL?**

5 A. No. Historically Qwest has treated expedites as a rate element subject to cost
6 based pricing. Expedites were provided for six years as part of the Section 251
7 interconnection agreement between Eschelon and Qwest.¹²⁸ In 2001, Qwest
8 confirmed that expedites were a part of accessing UNEs when Qwest asked the
9 Commission to establish an Individual Case Basis (“ICB”) rate for expedites. The
10 executive summary to the direct testimony of Qwest witness Robert F. Kennedy
11 states:

12 This Direct Testimony proposes recurring and nonrecurring
13 charges and describes certain products and services included
14 within the categories of Local Interconnection Service,
15 Collocation, CLEC-to-CLEC Connections, Unbundled Network
16 Elements and Other Services.¹²⁹

17 Expedites is listed in Mr. Kennedy’s testimony as within the category of
18 unbundled network elements, which means that Qwest understood they were

¹²⁷ Million Direct, p. 5, line 4; *see also id.* pp. 4-5.

¹²⁸ *Webber Direct (Adopted)*, pp. 8 – 10.

¹²⁹ Before the Arizona Corporation Commission, In the Matter of Investigation into Qwest Corporation’s Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts, Docket No. T-00000A-00-0194 Phase II (“Phase II UNE Cost Docket”), Direct Testimony of Robert F. Kennedy (“Kennedy Direct”), Qwest Corporation, March 15, 2001, p. 1. *See also* Exhibit DD-4.

1 subject to cost-based (*i.e.* TELRIC) pricing. Mr. Kennedy notes that, "Qwest
2 proposes to charge for Expedites and Cancellations on an ICB basis."¹³⁰

3 **Q. DID THE COMMISSION MAKE ANY RULING WITH RESPECT TO**
4 **QWEST'S FILING REGARDING EXPEDITE CHARGES?**

5 A. Yes. The Commission in its order in the UNE Cost Docket found that "Qwest is
6 directed to develop cost studies for all services offered in this docket on an ICB
7 price basis in Phase III. Qwest should make every effort to develop reasonable
8 cost-based prices for such services even if it has little or no experience actually
9 provisioning the services."¹³¹ Because Qwest "offered in this docket on an ICB
10 price basis" the provision of expedites, expedite charges are subject to this order.

11 **Q. HAS ANY QWEST CONDUCT SINCE THEN INDICATED THAT**
12 **QWEST WOULD COMPLY WITH THAT ORDER?**

13 A. Yes. In its current Arizona SGAT (dated February 10, 2005), Qwest lists footnote
14 five next to the Expedite rate element.¹³² Footnote five reads: "Rates for this
15 element will be proposed in Arizona Cost Docket Phase III and may not reflect
16 what will be proposed in Phase III. There may be additional elements designated
17 for Phase III beyond what are reflected here."¹³³ Inclusion of this footnote

¹³⁰ *Phase II UNE Cost Docket, Kennedy Direct*, p. 47. See also Exhibit DD-4.

¹³¹ *Phase II UNE Cost Docket*, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p. 75. See also Exhibit DD-4.

¹³² See Exhibit JW-C (adopted) (SGAT pages, p. 14 of 19). Qwest's SGAT is available at its website. See page 12, section 9.20.14 for the Expedite rate element. http://www.qwest.com/about/policy/sgats/SGATSdocs/arizona/AZ_14th_Rev_3rd_Amend_Exh_A_2_10_05_Clean.pdf

¹³³ *Id.*, page 16, note 5.

1 indicates that Qwest recognized that expedite charges are subject to this
2 Commission order. Qwest has never sought permission from this Commission to
3 remove expedites from the list of UNE rate elements, nor has the Commission
4 issued an order removing expedites. Therefore, cost-based rates for Expedites are
5 still required by the Commission's order (in addition to Section 252(d)(1)(A)(i) of
6 the federal Act).

7 **Q. GIVEN THAT HISTORICALLY QWEST PROVIDED EXPEDITES FOR**
8 **UNBUNDLED LOOPS UNDER SECTION 251 AGREEMENTS AND SAID**
9 **THAT IT WOULD PROPOSE RATES IN THE UNE COST DOCKET**
10 **PHASE III, WHAT REASON DOES QWEST GIVE FOR**
11 **IMPLEMENTING NON COST BASED RATES WITHOUT TAKING**
12 **THAT STEP?**

13 A. Qwest has made its own determination that it believes it is better to charge a
14 market based rate.¹³⁴ Its proffered reasons for that determination have vacillated.
15 Qwest has argued that expedites are "not UNES"¹³⁵ (in direct contradiction to the
16 Qwest UNE Cost Docket filing described in the previous paragraph). Qwest has
17 claimed that expedites are not UNES because expedites are not on the FCC's list
18 of Section 251 network elements and because they are "superior" services. In
19 contrast, Qwest has also implicitly accepted that expedites are part of accessing
20 UNES because it has described expedites in the context of the statutory

¹³⁴ Million pp. 6-7.

¹³⁵ Qwest-Eschelon AZ ICA Arbitration Albersheim Direct, p. 64, line 12; *see also* Million Direct, p. 3 lines 15-23 & p. 5, line 5.

1 requirements for offering "access to network elements on a nondiscriminatory
2 basis" based on whether the network element has a "retail analogue."¹³⁶ Qwest
3 has claimed both that UNE loops do *not* have a retail analogue (though it now
4 claims this applies only to UNE DSO loops)¹³⁷ and that UNE DS1 and DS3 loops
5 *do* have a retail analogue.¹³⁸

6 **Q. PLEASE RESPOND TO QWEST'S ARGUMENT THAT EXPEDITES**
7 **SHOULD NOT BE COST-BASED BECAUSE "EXPEDITES ARE NOT**
8 **UNE'S"**¹³⁹ **BECAUSE THEY ARE NOT ON THE FCC'S LIST OF**
9 **SECTION 251 ELEMENTS.**¹⁴⁰

10 **A.** This is an earlier Qwest argument, but Ms. Million's testimony continues to
11 suggest that it is one of the bases for Qwest's position. When it argues that
12 expedites are not on the list of UNEs, Qwest is asking the Commission to engage
13 in the following rudimentary exercise: (1) take the list of seven or eight UNEs
14 identified by the FCC (e.g., "loop");¹⁴¹ (2) compare the words on that list to the

¹³⁶ *In the Matter of the Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, FCC 99-404, CC Docket No. 99-295, rel. December 22, 1999 ["Bell Atlantic NY 271 Order"] at ¶ 44.

¹³⁷ In its November 18, 2005 CMP Response, Qwest gave the following reason for its refusal to provide the capability to expedite orders for loops under the Expedites Process: "Qwest does not sell *Unbundled Loops* to its end user customers so it is not appropriate to make a comparison to retail in this situation." See Exhibit BJJ A-7 at 000124 (last paragraph) (emphasis added). Although today Qwest attempts to limit this statement to DSO loops (see Albersheim Direct, p. 12, lines 18-19), the statement on its face applied to all unbundled loops. Qwest made this statement to CLEC operational personnel in the CMP context.

¹³⁸ Albersheim Direct, p. 12, lines 18-19.

¹³⁹ Albersheim Direct, p. 64, line 12.

¹⁴⁰ Million Direct, p. 3, lines 15-23 & p. 5, line 5.

¹⁴¹ See, TRRO §51.319; see also FCC First Report and Order ¶ 27 ["The minimum set of network elements the Commission identifies are: local loops, local and tandem switches (including all

1 term being requested (e.g., "expedite"); and (3) find that Sections 251 and 252 do
2 not apply if the same word is not on both lists. If the exercise were that simple,
3 however, there would hardly be several hundred pages of FCC orders discussing
4 *access to* UNEs. Note that ICA Exhibit A (the rate sheet) contains nearly 600
5 items with rates. If Qwest's test were applied, Exhibit A would contain less than
6 ten items with rates. Obviously, Qwest's proposed approach is not the test the
7 Commission has applied in determining cost-based rates pursuant to Sections 251
8 and 252.

9 The issue is not whether a term (e.g., "expedite") is itemized on the minimum list
10 of "UNEs"; the issue is nondiscriminatory *access to* UNEs. In ¶268 of its *First*
11 *Report and Order*, the FCC found that the requirement to provide "access" to
12 UNEs must be read broadly, concluding that the Act requires that UNEs "be
13 provisioned in a way that would make them useful."¹⁴² Expedites are needed to
14 make UNEs useful. Nondiscriminatory access to UNEs must be provided at cost-
15 based rates.¹⁴³

16 **Q. PLEASE DESCRIBE MS. ALBERSHEIM'S ARGUMENT THAT**
17 **EXPEDITES ARE NOT UNES BECAUSE THEY ARE SUPERIOR**
18 **SERVICES.**

vertical switching features provided by such switches), interoffice transmission facilities, network interface devices, signalling and call-related database facilities, operations support systems functions, and operator and directory assistance facilities.]"

¹⁴² See Webber Direct (adopted), p. 98.

¹⁴³ 47 C.F.R. §51.307(a); 47 U.S.C. §252(d)(1)(A)(i).

1 A. Ms. Albersheim argues Qwest should be able to impose upon Eschelon and other
2 CLECs the “same” price that Qwest charges its private line retail customers.¹⁴⁴
3 She then compares Qwest’s charges for expediting unbundled loops with its
4 tariffed charges for retail expedites and concludes that, in fact, Qwest is offering
5 Eschelon expedite terms that are superior to those that it offers Qwest retail
6 customers.¹⁴⁵

7 **Q. IS IT PROPER TO COMPARE CHARGES IMPOSED BY QWEST ON**
8 **CLECS WITH EXPEDITE CHARGES IMPOSED BY QWEST ON ITS**
9 **RETAIL CUSTOMERS?**

10 A. No. The relevant comparison, for purposes of determining whether charges are
11 discriminatory, is between the charges faced by CLECs and the expedite charges
12 Qwest incurs when it expedites service to one of its retail customers (i.e., what
13 Qwest charges “itself”). This is the appropriate comparison because Qwest acts
14 in a dual role of the CLECs’ provider of bottleneck facilities and the CLECs’
15 competitor in retail markets, and is supported by the following FCC rule:

16 **§ 51.313 Just, reasonable and nondiscriminatory terms and**
17 **conditions for the provision of unbundled network elements.**
18

19 (b) Where applicable, the terms and conditions pursuant to which
20 an incumbent LEC offers to provide access to unbundled network
21 elements, including but not limited to, the time within which the
22 incumbent LEC provisions such access to unbundled network
23 elements, shall, *at a minimum, be no less favorable to the*

¹⁴⁴ Albersheim Direct, p. 12, lines 1-4.

¹⁴⁵ Albersheim Direct Testimony at 12.

1 *requesting carrier than the terms and conditions under which the*
2 *incumbent LEC provides such elements to itself.*¹⁴⁶

3 Qwest faces only the cost of an expedite when expediting its own orders, instead
4 of the non-cost-based per day charge that it charges its retail customers. Qwest
5 has stated that the expedite rate is \$200 per day for Qwest retail customers and
6 CLECs and admits that this rate is not cost-based.¹⁴⁷ Common sense dictates that
7 Eschelon cannot pay Qwest a wholesale rate that is equal to Qwest's retail rate
8 and still expect to compete. UNEs are a wholesale product and the expedite rate
9 for UNE orders should be cost-based, and not set based on retail tariff offerings.

10 Charging Eschelon a non-cost based, retail price that is higher than Qwest's own
11 expedite costs would violate rule §51.313 because this price constitutes terms that
12 are less favorable than terms faced by Qwest in expediting its own orders.
13 Eschelon and Qwest compete in the retail market and this competition includes an
14 ability to offer expedite service to retail customers "on competitive" terms. By
15 charging Eschelon a wholesale expedite price that exceeds the cost of the
16 expedite, Qwest is gaining an unfair advantage because Qwest can "profit" on the
17 difference between the wholesale price of an expedite and Qwest's cost associated
18 with expedites. This advantage would be the same as the advantage that Qwest
19 would have if it charged above-cost rates for UNE loops and other UNE elements
20 – a situation that the unbundling rules and TELRIC pricing are designed to avoid.

¹⁴⁶ 47 CFR § 51.313.

¹⁴⁷ Million Direct Testimony at 7.

1 Thus, Ms. Albersheim's contention that "Eschelon is actually getting superior
2 rates and conditions"¹⁴⁸ is based on a false comparison between a retail price and
3 a wholesale price.

4 **Q. MS. MILLION CLAIMS THAT EXPEDITE CHARGES OFFERED TO**
5 **ESCHELON AND OTHER CLECS FOR UNE ORDERS SHOULD NOT**
6 **BE COST BASED.¹⁴⁹ PLEASE EXPLAIN HOW THIS ARGUMENT IS**
7 **FLAWED.**

8 A. The key to Ms. Million's argument is her incorrect assumption that expedites
9 comprise "superior" services.¹⁵⁰ It is based on this assumption that Ms. Million
10 concludes that expedites are not subject to Section 252 of the
11 Telecommunications Act and, therefore, are not required to be provided at cost-
12 based rates.¹⁵¹

13 **Q. ON WHAT BASIS DOES MS. MILLION ASSERT THAT EXPEDITES**
14 **REPRESENT A "SUPERIOR SERVICE" THAT IS NOT SUBJECT TO**
15 **SECTION 252?**

16 A. The basis for this claim is not clear because nowhere in her testimony does Ms.
17 Million define the concept of "superior service." Ms. Million appears to be

¹⁴⁸ Albersheim Direct Testimony at 13.

¹⁴⁹ Million Direct Testimony at p. 3, line 12-p. 4, line 21.

¹⁵⁰ Ms. Million acknowledged, in the ICA arbitration proceeding in Minnesota, that if expedites are not a "superior service," then TELRIC pricing is appropriate. See, e.g., *In the Matter of the Petition of Eschelon Telecom, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996*, Minnesota Public Utilities Commission Docket No. P-5340, 421/IC-06-768, Hearing Transcript, Vol. 2, p. 94, line 24-p.95, line 2.

¹⁵¹ Million Direct Testimony at p. 4, lines 17-21.

1 claiming that expedited service is a “superior service” because it allows the
2 customer to receive service more quickly than would otherwise be the case.¹⁵² In
3 other words, Ms. Million seems to argue that expedited service is “superior” to
4 service provided under the regular interval. If this is, in fact, the basis of Qwest’s
5 position, it is incorrect.

6 Ms. Million cites the Eighth Circuit’s decision in the *Iowa Utilities Board* case¹⁵³
7 for the proposition that nondiscriminatory access does not require the incumbent
8 to provide superior service.¹⁵⁴ While Ms. Million parrots the phrase “superior
9 service,” she overlooks that, in discussing what constituted superior service, the
10 Eighth Circuit found that the Act does not require an incumbent to provide service
11 that is superior to *what the incumbent provides itself* in connection with providing
12 service to its retail customers.¹⁵⁵ Thus, if Qwest provides a particular service –
13 such as expedites – to its retail customers, and therefore to itself, as a matter of
14 course, then that service is not “superior.”

¹⁵² See Million Direct Testimony at p. 5, lines 17-19 (“[T]he service of expediting an order is a superior service that allows a CLEC to circumvent the standard installation intervals provided for UNEs.”) and p.8, lines 19-22 (“[S]ome customers, including CLECs, are willing to pay a premium in order to receive what they perceive to be the superior service of shortening their installation interval and moving to the head of the line.”)

¹⁵³ *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff’d in part, rev’d in part*, 525 U.S. 366 (1999) (“*Iowa Utilities Board*”).

¹⁵⁴ Million Direct Testimony at p. 4, lines 1-6.

¹⁵⁵ *Iowa Utilities Board*, 120 F.3d at 812 (“Another source of disagreement between the petitioners and the FCC arises over the Agency’s decision to require incumbent LECs to provide interconnection, unbundled network elements, and access to such elements at levels of quality that are superior to levels at which the incumbent LECs provide these services to themselves.”)

1 Significantly, Ms. Million does *not* argue that expedites are a superior service
2 because Qwest does not expedite orders for its own retail customers. Similarly,
3 Ms. Million does *not* argue that expedites comprise a superior service because
4 customers other than Eschelon (for example, other CLECs or retail customers)
5 cannot request that orders be expedited. Qwest cannot deny that it expedites
6 orders for other CLECs and for its own retail customers. Expedited orders are
7 provided to a variety of Qwest's customers and therefore, they do not comprise a
8 superior service.

9 Further, that the ability to expedite UNE installation, for example, is available as
10 *an option*, does not mean that such expedited access to UNEs should not be
11 subject to cost-based regulation. Indeed, Qwest offers *options*, if you will, for a
12 number of products that constitute access to UNEs. For example, Qwest offers
13 UNE loop installation in different forms – Basic Installation, Basic Installation
14 with Performance Testing, and Coordinated Installation with Cooperative
15 Testing.¹⁵⁶ Qwest does not argue that only the Basic Installation option should be
16 priced consistent with cost-based principles, while all other, arguably “superior”
17 options should be based on the price that the market can “bear.”¹⁵⁷ Similarly,
18 Exhibit A to the parties' interconnection agreement, which lists the rates
19 applicable to unbundled elements and services to be provided under Section 252,
20 contains the agreed-upon charges for Standard, Overtime and *Premium* Managed

¹⁵⁶ See ICA Exhibit A, Section 9.2.4. As seen from the notes in Exhibit A, these rates for installation are based on the Commission's cost docket, T-00000A-00-194, Phase II Order 64922.

¹⁵⁷ Million Direct Testimony at p. 21, lines 11-14.

1 Cuts,¹⁵⁸ and Overtime and *Premium* Labor.¹⁵⁹ To the best of my knowledge,
2 Qwest has not argued these options or “premium” access to these products should
3 be subject to a different pricing standard than those standards which are
4 applicable to “basic” access or level of service because these options constitute
5 “superior service.”

6 Finally, that Qwest proposes to provide expedites under an amendment to
7 Eschelon’s ICA, rather than pursuant to a commercial agreement, demonstrates
8 that Qwest, itself, recognizes that expedites fall within the scope of Section 252.

9 **Q. COULD QWEST BE CLAIMING THAT THE EXPEDITE SERVICE IT IS**
10 **WILLING TO PROVIDE ESCHELON IS “SUPERIOR” BECAUSE IT**
11 **“COSTS LESS” THAN A RETAIL EXPEDITE?**

12 A. Ms. Albersheim has stated that, because the “standard interval” for a DS1 Capable
13 Loop is 5 days and the provisioning interval for a DS1 private line is 9 days, the
14 expedite for the loop “costs less” than for the private line, even though the rate is
15 \$200 per day for both customers, because the private line customer would pay
16 more than the UNE customer to have the service delivered in one day.¹⁶⁰ Based
17 on this, Ms. Albersheim asserts that “Eschelon is actually getting superior rates
18 and conditions.” I am aware that, in the arbitration proceedings, Qwest has used a
19 similar analysis to support its claim that expedites represent a “superior service”

¹⁵⁸ ICA Exhibit A, Section 10.1.2. The note to this rate says that the rate has not been addressed in cost docket but is “estimated TELRIC.”

¹⁵⁹ ICA Exhibit A, Section 9.20.2. The note to this rate says that it is based on the Commission’s cost docket, T-00000A-00-194, Phase II Order 64922.

¹⁶⁰ Albersheim Direct Testimony at 13, lines 5-18.

1 and, therefore, are not required to be provided at cost-based rates.¹⁶¹ It is unclear
2 whether Qwest means to be making a similar argument here, but if it does, that
3 argument is incorrect.

4 In order to more fully ascertain the extent to which a service should be considered
5 a “superior” service and, if so, how it should be priced, one threshold question to
6 be addressed is whether Qwest provides the service to itself for its own retail
7 customers, separate from the question of price. If so, the analysis in this case
8 moves to another question, which addresses what the price should be. It is
9 incorrect to equate not providing a wholesale service *at the same price* as a retail
10 service with superior service, because it confuses these concepts and
11 inappropriately collapsed the two questions into one.¹⁶² Although Qwest takes the
12 position that private line service is the retail analogue of an unbundled DS1
13 Capable Loop, Qwest presumably would not claim that it is appropriate to charge
14 the same price for the unbundled loop as for the retail service.¹⁶³

¹⁶¹ *In the Matter of the Petition of Eschelon Telecom, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996*, Minnesota Public Utilities Commission Docket No. P-5340, 421/IC-06-768, Albersheim Direct, p. 59, line 20-p. 60, line 10 (characterizing expedites as a “premium service”) and Million Rebuttal, p. 19 footnote 11 (“Qwest witness Renee Albersheim explains why and how expedited orders are a superior class of service in her Direct Testimony, p. 59-60, lines 20-22, 1-10.”)

¹⁶² At the hearing in the Minnesota arbitration proceeding, Ms. Albersheim admitted that the fact that there’s a difference in price between two services does not mean that the lower priced service is a superior service for purposes of determining whether that service is a UNE. *In the Matter of the Petition of Eschelon Telecom, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996*, Minnesota Public Utilities Commission Docket No. P-5340, 421/IC-06-768, Hearing Transcript, Vol. 1 at page 26, lines 14-18.

¹⁶³ Cf. Albersheim Direct Testimony at p. 12, lines 1-4.

1 Q. MS. MILLION REFERENCES A DECISION OF THE FLORIDA
2 COMMISSION IN SUPPORT FOR HER ARGUMENT THAT THE
3 EXPEDITE CHARGES ASSOCIATED WITH UNE ORDERS SHOULD
4 NOT BE COST-BASED.¹⁶⁴ IS THIS CITATION PERSUASIVE?

5 A. No. Contrary to the Eighth Circuit's superior service analysis, the Florida
6 Commission failed to consider the nature of the service that the incumbent
7 provided to itself. The correct analysis of that issue is that reflected in the
8 decision of the North Carolina Commission in the *NewSouth* case,¹⁶⁵ which is
9 discussed in my (adopted) Direct Testimony.¹⁶⁶ In that case, the North Carolina
10 commission rejected BellSouth's arguments and affirmed its conclusion that
11 expedited service is subject to the nondiscrimination obligations of Section 251,
12 stating, "The Commission also believes that expediting service to customers is
13 simply one method by which BellSouth can provide access to UNEs and that,
14 since BellSouth offers service expedites to its retail customers, it must provide
15 service expedites at TELRIC rates pursuant to Section 251 and Rule
16 51.311(b)."¹⁶⁷

17 Q. MS. MILLION DESCRIBES TELRIC AND TSLRIC COSTING
18 METHODS.¹⁶⁸ DOES HER DESCRIPTION SUPPORT QWEST'S

¹⁶⁴ Million Direct Testimony at p. 4, lines 6-15.

¹⁶⁵ *Re NewSouth Communications Corp.*, 2006 WL 707683 (N.C.U.C. February 8, 2006).

¹⁶⁶ Webber Direct Testimony (adopted) at p. 39, lines 3-13.

¹⁶⁷ *Id.* at *47; see also *Re Verizon Delaware, Inc.*, 2002 WL 31521484 at *12 (Del. Pub. Serv. Comm'n 2002) (requiring cost-based rate for expedited CLEC service orders).

¹⁶⁸ Million Direct Testimony at p. 2, line 12-p. 3, line 11.

1 POSITION WITH RESPECT TO THE APPROPRIATE WHOLESALE
2 RATE FOR EXPEDITES?

3 A. No. Ms. Million admits that Qwest's expedite charge is not based on cost.¹⁶⁹
4 Accordingly, if the Commission rejects Qwest's argument that expedites are a
5 superior service, then there is no dispute that Qwest's non-cost based expedite
6 charge is inappropriate.

7 Q. MS. MILLION ARGUES THAT EXPEDITE CHARGES FOR UNE
8 ORDERS SHOULD BE BASED ON A PRICE THAT A "MARKET CAN
9 BEAR."¹⁷⁰ PLEASE EXPLAIN WHY HER ARGUMENT IS FLAWED.

10 A. First, Ms. Million neglects to mention that the market in question is the wholesale
11 market for provisioning essential bottleneck facilities such as the UNE loop, *to*
12 *which Qwest is a dominant (if not sole) provider.* Eschelon cannot simply go to
13 another wholesale provider to get a better price. The FCC described this situation
14 as follows:

15 Congress recognized that, because of the incumbent LEC's
16 incentives and superior bargaining power, its negotiations with
17 new entrants over the terms of such agreements would be quite
18 different from typical commercial negotiations. As distinct from
19 bilateral commercial negotiation, the new entrant comes to the
20 table with little or nothing the incumbent LEC needs or wants. The
21 statute addresses this problem by creating an arbitration proceeding
22 in which the new entrant may assert certain rights, including that
23 the incumbent's prices for unbundled network elements must be
24 "just, reasonable and nondiscriminatory."¹⁷¹

¹⁶⁹ Million Direct Testimony at p. 7, lines 15-17.

¹⁷⁰ Million Direct Testimony at p. 6, lines 11-14.

¹⁷¹ Local Competition Order, ¶15.

1 Ms. Million fails to acknowledge that the dominant provider in the wholesale
2 market (Qwest) also competes with Eschelon and other CLECs in retail markets.
3 The dominant provider has the ability and incentives to use its "superior
4 bargaining power"¹⁷² in its wholesale markets to gain advantage in retail markets.
5 This very combination is what constitutes the economic barriers to meaningful
6 competition that the Telecommunications Act and federal unbundling rules were
7 developed to remedy.

8 Second, Ms. Million's argument that the price should be set at a level that the
9 market can bear is meaningless: Ms. Million overlooks basic economic theory
10 which is, generally speaking, as the price of a good or service goes up, the
11 quantity goes down, and at some point the quantity of demand will drop to zero.
12 Ms. Million's suggestion (that the "value" of expedite should be determined based
13 on the price that the market can bear) does not result in the maximum *total* value
14 of expedites. Note that the basic economic theory¹⁷³ says that there exists a
15 certain price level that maximizes the total value for the product *for the producer*
16 (Qwest); and there also exist *another, lower* price level that maximizes the total
17 value of the product *for society* (which includes Qwest, Eschelon, other CLECs
18 and End User Customers). The first level is the price resulting from an
19 unregulated monopoly market; the second price is the price resulting from a
20 competitive market. It is this basic economic theory that has been at the heart of

¹⁷² Local Competition Order, ¶15.

¹⁷³ Virtually any microeconomic textbook covers this topic. See for example, B.E. Binger and E. Hoffman *Microeconomics with Calculus*, Scott, Foresman and Company, 1985, pp. 377-386.

1 governmental regulation of local telecommunications markets both before and
2 after the Telecommunications Act.¹⁷⁴ Now Ms. Million is suggesting to dismiss
3 this regulation and the economic theory behind it, and instead, let the dominant
4 provider dictate its price for expedites. As is evident from the following citation,
5 the TRRO confirmed that the ILECs' dominance in the provisioning of essential
6 bottleneck facilities continues to be a reason for price regulation in UNE markets.

7 It would be unreasonable to conclude that Congress created a
8 structure to incent entry into the local exchange market, only to
9 have that structure undermined, and possibly supplanted in its
10 entirety, by services priced by, and largely within the control of,
11 incumbent LECs.¹⁷⁵

12 **Q. MS. MILLION ARGUES THAT THE COMMISSION ACCEPTED THE**
13 **SAME EXPEDITE CHARGE AS QWEST PROPOSES HERE IN**
14 **MULTIPLE TARIFFS.¹⁷⁶ DOES THIS ARGUMENT SUPPORT QWEST'S**
15 **POSITION?**

16 **A.** No. None of these tariffs dealt with access to UNEs.¹⁷⁷ These services were de-
17 regulated because the Commission found sufficient evidence of competition in
18 these markets, while the markets for essential local facilities such as the local loop

¹⁷⁴ The Local Competition Order (at ¶ 740) elaborates on the issue of pricing in competitive and non-competitive markets as follows: "Just compensation is not, however, intended to permit recovery of monopoly rents. The just and reasonable rate standard of TELRIC plus a reasonable allocation of the joint and common costs of providing network elements that we are adopting attempts to replicate, with respect to bottleneck monopoly elements, the rates that would be charged in a competitive market, and, we believe, is entirely consistent with the just compensation standard." (footnotes omitted).

¹⁷⁵ TRRO, ¶ 48.

¹⁷⁶ Million Direct Testimony at p. 5, line 26-p. 6, line 4.

¹⁷⁷ In her testimony, Ms. Million refers specifically to the Access Service Price Cap Tariff and Price List, the Competitive Private Line Transport Services Price Cap Tariff, and the Exchange and Network Services Price Cap Tariff.

1 continue to be impaired without special pricing rules applied to them.¹⁷⁸

2 Similarly, Access Services, which provide network access to long-distance
3 services, as well as local services *in the markets with sufficient facilities-based*
4 *competition*,¹⁷⁹ are regulated based on a different set of standards than access to
5 UNE markets (network elements in impaired markets). The TRRO confirmed the
6 need for a different pricing standard in the markets for UNEs than the pricing
7 standard used in the Access markets. This fact is captured in the following
8 citation from the FCC TRRO:

9 Here, upon further consideration, we determine that in the local
10 exchange market, the availability of a tariffed alternative should
11 not foreclose unbundled access to a corresponding network
12 element, even where a carrier could, in theory, use that tariffed
13 offering to enter a market.¹⁸⁰

14 Thus, Congress's enactment of section 251(c)(3), and the
15 associated cost-based pricing standard in section 252(d)(1), at a
16 time when special access services were already available to
17 carriers in the local exchange market indicates that UNEs were
18 intended as an *alternative* to these services, available at
19 **alternative pricing**.¹⁸¹

20 **Q. IN SUPPORT OF HER CLAIM THAT EXPEDITED ORDERS FOR UNES**
21 **SHOULD NOT BE COST BASED, MS. MILLION MENTIONS THAT THE**

¹⁷⁸ TRRO, ¶ 2. UNE Loop markets are those markets that continue to be considered impaired as defined by TRRO.

¹⁷⁹ As defined by the TRRO.

¹⁸⁰ TRRO, ¶ 48.

¹⁸¹ TRRO, ¶ 51 (italicized font is original to the source; bold font added for emphasis).

**FCC EXCLUDED CERTAIN NETWORK ELEMENTS FROM THE
UNBUNDLING REQUIREMENTS.¹⁸² PLEASE RESPOND.**

A. Ms. Million's argument is counter productive. Indeed, she says that the FCC's list of Section 251 elements is limited to those elements and services that are necessary for a CLEC to compete with the ILEC "on an equal footing."¹⁸³ She states that as part of its TRRO, the FCC excluded from this list unbundled switching, shared transport and the UNE-Platform. This comment only confirms that the products *that remain* on the FCC list of elements -- including unbundled loops -- are necessary for a CLEC to compete with the ILEC "on an equal footing."¹⁸⁴ As such, non discriminatory access to those elements remains critical, and Qwest's proposal is contrary to the FCC's continuing requirement that CLECs remain able to avail themselves of these elements as required.

**Q. MS. MILLION CLAIMS THAT THE ABILITY TO EXPEDITE ORDERS
HAS VALUE BECAUSE IT ALLOWS ESCHELON TO "LEAPFROG"
OVER OTHER CUSTOMERS.¹⁸⁵ DOES THIS ARGUMENT JUSTIFY A
NON-COST BASED EXPEDITE FEE?**

A. No. Ms. Million neglects to recognize that as a wholesale provider and competitor to CLECs in retail markets, Qwest faces a different expedite "fee" than the fee it proposes to charge Eschelon. This fee is Qwest's internal cost of

¹⁸² Million Direct Testimony at p. 20 lines 5-6.

¹⁸³ Million Direct Testimony at p. 20 lines 5-7.

¹⁸⁴ Cf. Million Direct Testimony at p. 5, lines 5-7.

¹⁸⁵ Million Direct Testimony at p. 7, lines 21-24.

1 expediting the order. Because Qwest proposes to charge Eschelon an expedite fee
2 that is not based on costs, Qwest's proposal allows Qwest to "leapfrog" ahead of
3 CLECs on unfair and discriminatory terms by using its unique position as a
4 provider of essential facilities.

5 In addition, Qwest provides expedites when the emergency conditions are met
6 only if resources are available. If resources are available, there is no one to "leap"
7 over.

8 **Q. QWEST ALLEGES THAT ESCHELON "IS NOT TRULY INTERESTED**
9 **IN ESTABLISHING A COST-BASED RATE"**¹⁸⁶ **BECAUSE ITS INTERIN**
10 **PROPOSAL IS NOT COST BASED AND SAYS THAT ESCHELON'S**
11 **INTERIM PROPOSAL IN THE ARBITRATION CASE IS**
12 **"ARBITRARY."**¹⁸⁷ **PLEASE RESPOND.**

13 **A.** Although Eschelon believes its proposed interim rate exceeds costs, Eschelon
14 offers the rate on an interim basis as a compromise in the arbitrations until a cost-
15 based rate is established. Eschelon's arbitration proposed charge is expressly an
16 interim rate. It affords Qwest the opportunity to obtain a higher permanent rate, if
17 Qwest can provide a TELRIC study to support that rate. If Qwest can present a
18 cost study that supports a per-day charge, then it will be permitted to assess such a
19 charge. To date, however, Qwest has provided no cost study and thus made no
20 effort to prove that it incurs additional costs when providing expedites that are not

¹⁸⁶ Million, p. 7, lines 9-10.

¹⁸⁷ Million, p. 7, line 8.

1 recovered in the installation charge and the \$100 interim additional expedite fee.
2 Eschelon has been straightforward in presenting this as a compromise offer and
3 therefore no adverse inference is warranted. Eschelon is truly interested in
4 establishing a cost-based rate. If the Commission decides to subject the rate to a
5 true-up, then a cost based rate will apply from the time the interim rate is
6 established.

7 Eschelon's arbitration interim proposal for a flat per order charge is more
8 reasonable and not arbitrary. It is a per order charge; not a per day charge.
9 Because the only additional cost that Qwest *may* incur to expedite an order
10 involves the cost of processing the expedite order, this cost will not vary based on
11 the number of days by which service is sought to be expedited.¹⁸⁸ Accordingly, a
12 per day charge is inappropriate.¹⁸⁹ Several factors confirm its reasonableness.

13 The reasonableness of Eschelon's proposed \$100 per order charge is shown by
14 comparison of that charge with other rates that the Commission has established.
15 Eschelon's proposed interim expedite rate, for example, is more than the
16 Commission-approved rate – \$87.93 – for basic installation of a DS1 capable
17 loop.¹⁹⁰ Qwest has acknowledged that expediting service does not require any
18 additional provisioning activities; it merely involves performing the same

¹⁸⁸ Webber Direct (adopted), p. 93.

¹⁸⁹ Webber Direct (adopted), pp. 96-97.

¹⁹⁰ If Eschelon expedited a loop order by 5 days, Qwest proposes to charge Eschelon \$1,000 (\$200 X 5 days). Eschelon's \$100 per order charge is also closer than Qwest's proposed rate to the Commission-approved rate – \$194.07 – for *Coordinated* Installation with *Cooperative Testing* for installation of a DS1 capable loop, Qwest's most expensive installation option for DS1 loops.

1 provisioning activities more quickly than would otherwise be the case.¹⁹¹ An
2 additional expedite charge that approaches or even exceeds the amount of the
3 charge for all of the activities for an entire installation of a facility should more
4 than amply compensate Qwest for performing the installation activities more
5 quickly.

6 Another point of comparison is the rate for “express service” – which essentially
7 is an expedite service offered to residential customers in Arizona and defined as
8 provisioning of access line dial tone prior to the standard installation service date.

9 Under its express service offering, Qwest offers same-day installation for a \$22
10 flat (per order) fee.¹⁹²

11 Another example of the reasonableness of Eschelon’s proposed \$100 per order
12 charge is a comparison with the rate that Qwest charges for a Due Date change.
13 As indicated in direct testimony, the approved rate in Arizona for a Due Date
14 change is \$10.22.¹⁹³ More recently, Qwest has proposed a higher rate for a Due
15 Date change in the Minnesota UNE cost case. Expediting an order changes the
16 date to an earlier date. Qwest’s proposed Due Date Change in Minnesota appears
17 to apply when the date is changed to a later date – “any time a customer requests a
18 Due Date Change after Qwest has assigned/dispatched a technician on the original

¹⁹¹ Exhibit MS-6, MN ICA Arbitration Transcript, Vol. 2, p. 97, line 18-p. 98, line 22.

¹⁹² See Qwest Arizona *Exchange and Network Services Price Cap Tariff*, Section 3, page 4 (Release 1). See also Webber Direct (adopted), p. 96.

¹⁹³ Webber Direct (adopted), p. 96 (SGAT §9.20.12).

1 due date.”¹⁹⁴ For these types of date changes, Qwest is proposing a per order (*i.e.*,
2 *not* per day) non-recurring charge of \$91.32, which is listed as the *additional*
3 *dispatch* charge.¹⁹⁵ In other words, in Minnesota, Qwest is proposing a per order
4 charge for due date changes that is *lower* than Eschelon’s proposed per order
5 \$100 interim charge for expediting the due date. Thus, in order to move the due
6 date for a loop order up by five days, Qwest proposes that it be permitted to
7 charge \$1000.00 (in addition to the regularly applicable installation charge),
8 although to move the due date for a loop order out, Qwest proposes that it be
9 permitted to charge an additional \$91.32, regardless of the number of days that
10 the due date is being moved.

11 Qwest has provided no evidence at all that expediting an order would require an
12 additional dispatch. To the contrary, Qwest has expressly admitted that
13 expediting service does not require *any* additional provisioning activities.¹⁹⁶ Even
14 assuming that expedites involve some non-provisioning “front office” type
15 activities,¹⁹⁷ there is no evidence to suggest that the cost of those activities
16 exceeds not only the Commission’s approved rate for basic installation of a DS1

¹⁹⁴ *In the Matter of Qwest Corporation's Application for Commission Review of TELRIC Rates Pursuant to 47 U.S.C. § 251*, Minnesota PUC Docket No. P-421/AM-06-713, OAH Docket No. 3-2500-17511-2 [*“MN UNE Cost Case”*], Attachment 3 Summary of Costs and Attachment 4 Element Description, December 21, 2006, at §§9.20.12 (Qwest proposed element description for §9.20.11).

¹⁹⁵ *MN UNE Cost Case*, Attachment 3 Summary of Costs and Attachment 4 Element Description, December 21, 2006, at §§9.20.12 (Date Change – states “see 9.20.11”) & 9.20.11 (Additional Dispatch, per Order \$91.32).

¹⁹⁶ Exhibit MS-6, MN ICA Arbitration Transcript (Qwest witness Terry Million), Vol. 2, p. 97, line 18-p, 98, line 22; *id.* p. 98, lines 16-17.

¹⁹⁷ 2 Hearing Transcript (Million) at p. 98, lines 15-16.

1 capable loop but also Qwest's own recently proposed Due Date charge in the
2 amount of an Additional Dispatch, when no additional dispatch is required for
3 expedites.

4 **Q. IS THERE OTHER EVIDENCE THAT A REASONABLE EXPEDITE**
5 **CHARGE WOULD NOT EXCEED THE COST OF INSTALLATION OF**
6 **THE LOOP?**

7 A. Yes. On July 16, 2004, Qwest increased its expedite charge in its retail tariff to
8 reflect a new \$200 per day charge.¹⁹⁸ Before July 31, 2004, Qwest's charges for
9 expedited orders better reflected the relationship between installation and the
10 expedite charge. At that time, Qwest's tariff read, "The Expedited Order Charge
11 is based on the extent to which the Access Order has been processed at the time
12 the Company agrees to the expedited Service Date."¹⁹⁹ Further, the tariff stated,
13 *"but in no event shall the charge exceed fifty percent (50%) of the total*
14 *nonrecurring charges* associated with the Access Order."²⁰⁰ As indicated above,
15 an additional expedite charge that approaches or even exceeds the amount of the
16 charge for all of the activities for an entire installation of a facility should more
17 than amply compensate Qwest for performing the installation activities more
18 quickly. With its former tariff provision, Qwest implicitly recognized that a

¹⁹⁸ See Qwest's Tariff FCC #1, section 5.2.2.D, 1st Revised Page 5-25. This is available on the Qwest website at:
http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/fcc1_s005p021.pdf#Page=1&PageMode=bookmarks

¹⁹⁹ See Qwest's Tariff F.C.C. #1, Original Page 5-25. This is available on the FCC website at:
http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/bin/binary_out.pl?69762

²⁰⁰ *Id.* (emphasis added).

1 reasonable charge to expedite an installation would not exceed the charge for all
2 of the work performed in the entire installation; in fact, it would be no more than
3 half.

4 The non-recurring charge for the installation of a DS1 channel termination, the
5 private line equivalent of a loop, was \$313.25.²⁰¹ Qwest's Transmittal No. 202,
6 supporting the change in the interstate tariff expedite rate contained a cost study
7 with a rate of \$133.57.²⁰² This cost study, available for download from the FCC
8 website, is the same cost study filed by Ms. Million as confidential TKM-1. The
9 only difference is the cost factors applied. Ms. Million reports a rate of
10 \$123.08.²⁰³ The expedite cost study includes two hours of unexplained
11 coordination time, which accounts for over half of the cost result. In addition, the
12 costs include activities such as order processing for retail services, which should
13 not be included in wholesale costs. These studies also include activities that

²⁰¹ See Qwest's Tariff F.C.C. #1, 1st Revised Page 7-346. This is available on the FCC website at:
http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/bin/binary_out.pl?69765

²⁰² See Qwest Transmittal No. 202, Description and Justification Qwest Expedite Order Charge,
available at: http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/bin/binary_out.pl?70394. It is
interesting to note that Qwest states that "This change is being made at the request of customers
who want a simpler and easier method to expedite their orders and calculate the cost of that
expedite" (paragraph 1). Apparently, Qwest is representing that its retail customers would prefer
to pay a higher, but certain rate of \$200 per day, rather than a rate that may be between \$0 and
\$156.63 but it is certain will not be more than \$156.63 (half of the installation charge). Qwest's
CLEC customer (Covad), in contrast, was simply trying to get expedites at all when the
emergency conditions were not met, as before that time Qwest would not provide them to CLECs
for non-emergencies at any price. See Exhibit BJJ A-2 at 000055. There was nothing to simplify
about, or any cost calculation method to make easier for, a fee-added process in non-emergencies
for CLECs, because there wasn't one. Eschelon's CLEC representative asked at the time if Qwest
retail was treated in the same manner, and Qwest did not answer that Qwest retail customers had
expedite capability already for non-emergencies, but at a lower rate. See Exhibit BJJ A-2 at
000055 (March 17, 2004 and April 21, 2004 entries in Covad CR Detail).

²⁰³ Ms. Million, p. 6, line 21.

1 would already be captured in the loop installation NRC such as monitoring and
2 logging service order completion, and testing.

3 **Q. ARE YOU AWARE OF ANY EVIDENCE THAT HAS BECOME**
4 **AVAILABLE SINCE YOUR DIRECT TESTIMONY THAT SUPPORTS**
5 **THE CONCLUSION THAT A PER DAY CHARGE DOES NOT REFLECT**
6 **QWEST'S COSTS?**

7 **A.** Yes. In the Minnesota ICA arbitration proceeding between Eschelon and Qwest,
8 Ms. Million testified as follows:

9 Q. Are there activities that Qwest does when it
10 expedites that it doesn't do when it delivers a loop on the
11 normal regular interval?

12 A. There are not activities that are different, but the
13 activities performed on different days than they would
14 normally be done.

15 Q. You do the same thing; you just do it faster?

16 A. That's correct.²⁰⁴

17 **Q. QWEST HAS CRITICIZED ESCHELON FOR NOT PROPOSING A**
18 **COST-BASED RATE FOR EXPEDITES, CONTENDING THAT THIS**
19 **SHOWS THAT ESCHELON IS NOT TRULY INTERESTED IN**

²⁰⁴ See, e.g., *In the Matter of the Petition of Eschelon Telecom, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996*, Minnesota Public Utilities Commission Docket No. P-5340, 421/IC-06-768, Hearing Transcript, Vol. 2, p. 97, lines 18-25.

1 **ESTABLISHING A COST-BASED RATE.²⁰⁵ IS IT ESCHELON'S**
2 **BURDEN TO PROVE QWEST'S COSTS?**

3 A. No. Qwest, not Eschelon, is the party that is in possession of the information
4 necessary to prove its costs and, accordingly, as this Commission has held, the
5 burden of proof is on Qwest to prove its costs.²⁰⁶

6 Q. **MS. MILLION PROVIDES AN EXAMPLE OF CONCERT-GOERS WHO**
7 **TYPICALLY PAY PREMIUM CHARGES FOR SEATS IN THE**
8 **FRONT.²⁰⁷ DOES MS. MILLION'S EXAMPLE JUSTIFY QWEST'S NON-**
9 **COST BASED RATES?**

10 A. No. The telecommunications industry is not akin to a rock concert. Ms. Million's
11 example only underscores that a dominant provider (a music star or Qwest) with
12 market power, when non-price regulated, can charge rates in excess of cost.
13 Although both industries have dominant providers, they differ with respect to the
14 importance of services they provide and the manner in which they are regulated.
15 The importance of telecommunications services is demonstrated by the long
16 history of its regulation and is captured in the very first provision of the
17 Communications Act of 1934:

18 **SEC. 1. [47 U.S.C. 151] PURPOSES OF ACT, CREATION OF**
19 **FEDERAL COMMUNICATIONS COMMISSION. For the**

²⁰⁵ Million Direct Testimony at 7, lines 1-11.

²⁰⁶ *In the Matter of the Investigation Into Qwest Corporation's Compliance With Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts*, Docket No. T-00000A-00-194, Phase II Order 64922 at 84 ("The burden of proof to establish a proper cost basis under the 1996 Act is on Qwest Corporation.")

²⁰⁷ *Million Direct*, p. 8.

1 purpose of regulating interstate and foreign commerce in
2 communication by wire and radio so as *to make available, so far*
3 *as possible, to all the people of the United States*, without
4 discrimination on the basis of race, color, religion, national origin,
5 or sex, a rapid, efficient, Nationwide, and world-wide wire and
6 radio communication service with *adequate facilities at reasonable*
7 *charges, for the purpose of the national defense, for the purpose of*
8 *promoting safety of life and property through the use of wire and*
9 *radio communication*, and for the purpose of securing a more
10 effective execution of this policy by centralizing authority
11 heretofore granted by law to several agencies and by granting
12 additional authority with respect to interstate and foreign
13 commerce in wire and radio communication, there is hereby
14 created a commission to be known as the "Federal
15 Communications Commission," which shall be constituted as
16 hereinafter provided, and which shall execute and enforce the
17 provisions of this Act.²⁰⁸

18 **Q. MS. MILLION SUGGESTS THAT THE CHOICE TO EXPEDITE**
19 **SHOULD BE BASED ON THE "PERCEIVED VALUE TO THEIR**
20 **BUSINESS."**²⁰⁹ **IS "VALUE OF SERVICE" APPROPRIATE PRICING**
21 **FOR WHOLESALE SERVICES?**

22 **A.** No. UNE rates are required to be based, not on the "value of service," but on
23 economic cost. This is for good reason, as the rates are meant to allow
24 competitors to have access to similar cost structures as the ILEC. Imagine if
25 Qwest were allowed to charge the "value of service" for all wholesale products
26 and services offered. The "value of service" to the CLEC is essentially the
27 amount that it can charge its end-user customers for the service. In essence,
28 "value of service" pricing extracts any profit available to the CLEC and

²⁰⁸ Emphasis added.

²⁰⁹ *Million Direct*, p. 8. The complete sentence reads: "Each CLEC makes the choice to pay the fee or not on the basis of the perceived value to their business to expedite orders."

1 redistributes that profit to the wholesale provider (i.e. Qwest). It is no wonder
2 that Qwest would prefer to charge this way for all wholesale services and it is
3 obvious why Congress and the FCC mandated economic costs, as meaningful
4 competition would not exist with UNEs priced according to the "value of
5 service."

6 **Q. MS. ALBERSHEIM STATES THAT ESCHELON HAS THE OPTION OF**
7 **PROVIDING SERVICE UNDER A QPP POTS SERVICE IF IT WANTS**
8 **TO HAVE THE SAME EXPEDITE TERMS AS THOSE ARE**
9 **AVAILABLE FOR NON-DESIGNED SERVICE. DO YOU AGREE THAT**
10 **THIS REPRESENTS A REASONABLE ALTERNATIVE?**

11 **A.** No. In this instance providing POTS service using QPP is more expensive than
12 providing POTS service using an unbundled loop. After all, once the service is
13 installed on QPP, the QPP recurring charges apply month after month at the
14 higher rate. To obtain the lower rate, Qwest would require Eschelon to convert
15 the customer, which would subject Eschelon to additional non-recurring charges
16 and the customer to another conversion. Eschelon has spent significant amounts
17 on its network and uses QPP when it cannot provide service using its own switch.
18 Further, Eschelon has a right under the Telecommunications Act to provide
19 service using unbundled loops. Qwest should not be permitted to interfere with

1 the exercise of that right by applying less favorable expedite terms to loops in
2 order to steer Eschelon to Qwest's more expensive QPP offering.²¹⁰

3 **Q. DOES QWEST ADDRESS ADDITIONAL ISSUES AS WELL?**

4 A. Yes. Qwest raises issues that have no bearing on this case. To the extent that
5 Eschelon does not address each and every one, because they do not go to the
6 issues in this case, this should not be understood as acceptance of Qwest's claims.
7 For example, Ms. Novak begins her testimony with an attack on Eschelon's
8 alleged payment history. In this case, however, Qwest does not dispute, and
9 seems to acknowledge,²¹¹ that Eschelon did pay the amount Qwest charged for
10 the private line expedite. I am aware of no legitimate reason for Qwest to raise
11 payment allegations in this case. Because Qwest has raised it, however, I have
12 attached responsive information in Confidential Exhibit DD-8. Similarly,
13 although Eschelon is one of Qwest's largest CLEC wholesale customers if not the
14 largest, Ms. Novak complains that Eschelon demands a great deal of her time and
15 that managing this account (which is approximately \$3 million a month) is more
16 time intensive than other CLEC accounts.²¹² She does not go on to explain the
17 relevance of this grievance. Ms. Johnson will address it briefly. Along the same
18 vein, Qwest made a number of accusations in its Answer, such as referring to

²¹⁰ With respect to the specific customer whose need for expedited service forms the basis for Eschelon's complaint in this matter, the customer required a T1 because it needed 24 channels – the equivalent of 24 analog lines. Even if Qwest had the facilities to provide 24 separate lines, it is highly unlikely that it would have expedited 24 QPP lines, given that emergency-based expedites are subject to resource availability.

²¹¹ Martain Direct, p. 41, lines 20-21.

²¹² Novak, p. 3, lines 14-18.

1 Eschelon's "intractability."²¹³ And, even though Qwest admittedly makes
 2 disconnects in error²¹⁴ and in this case Qwest made a separate error in process,²¹⁵
 3 Qwest repeatedly referred to Eschelon's "incompetence."²¹⁶ Despite an ICA
 4 requiring Qwest to provide expedite capability that Qwest disregarded, Ms.
 5 Novak adds that, "Eschelon should be thanking Qwest for helping them to get the
 6 service restored."²¹⁷ This is how service management treats a customer, when
 7 that customer has no choice of vendor for these unbundled products.

8 Eschelon has presented legitimate concerns and documented facts to the
 9 Commission for decision. Eschelon believes a reading of the Staff's Testimony
 10 and Conclusions in this matter is evidence that Eschelon's concerns have
 11 legitimacy. Eschelon asks the Commission to rule with respect to the real issues
 12 in this case, which are summarized in my Executive Summary and discussed
 13 throughout Eschelon's testimony.

14 **Q. DOES THAT CONCLUDE YOUR TESTIMONY?**

15 **A.** Yes, it does.

²¹³ Answer, p. 1, line 17.

²¹⁴ See, e.g., Exhibit Johnson (BJJ) A-1 at Document Nos. 000017 (Qwest Expedites and Escalations Overview PCAT Version 8) & Exhibit BJJ A-6 at 000107(Qwest Expedites and Escalations Overview PCAT Version 30).

²¹⁵ Qwest (Jean Novak) Direct, p. 10, footnote 3 (The Qwest "technician that restored the service for a brief period of time performed this work outside of Qwest's standard process. The technician is supposed to determine whether the outage has occurred due to a disconnect order. The technician failed to follow this step of the process").

²¹⁶ On page 1, line 17 of its Answer, Qwest states that Eschelon's customers found themselves out of service because of Eschelon's "incompetence." On page 2, lines 22-23 of its Answer, Qwest states that the cause of the disconnect was Eschelon's "incompetence." On page 2, line 25, Qwest again refers to Eschelon's "incompetence."

²¹⁷ Novak Direct, p. 14, lines 11-12.

EXHIBIT

"DD-1"

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE COMPLAINT)	DOCKET NO. T-01051B-06-0257
OF ESCHELON TELECOM OF ARIZONA,)	DOCKET NO. T-03406A-06-0257
INC. AGAINST QWEST CORPORATION)	
)	

EXHIBIT DD-1

TO THE

REBUTTAL TESTIMONY

OF

DOUGLAS DENNEY

ON BEHALF OF

ESCHELON TELECOM OF ARIZONA, INC.

February 13, 2007

**TABLE OF ATTACHMENTS TO ESCHELON DIRECT AND REBUTTAL
TESTIMONY**

**JOHNSON (BJJ) DIRECT: ATTACHMENTS TO THE DIRECT TESTIMONY OF
MS. BONNIE J. JOHNSON**

A. CHRONOLOGY OF QWEST CMP CHANGES RELATING TO EXPEDITES

A-1. Expedites Process – Later Called “Expedites Requiring Approval” Process

Version 8 of the Expedite and Escalations Overview PCAT

Qwest September 20, 2001 Level 2 Product Notification (documenting existing expedite process)

Qwest's Retail pages from Infobuddy/RPD (as of 6/20/04)

Qwest response to Eschelon's data request ESCH01-009I (regarding updates to Qwest's Retail pages from Infobuddy/RPD)

**A-2. Optional, Additional Pay-for-Expedites Not Meeting Criteria Process
(Optional “Pre-Approved Expedite” Process)**

Version 11 Qwest Redline: Version 11 Expedite and Escalations Overview PCAT – Qwest redline showing changes from Version 10 (adding optional expedite for-a-fee process (Pre-Approved Expedite Process))

Covad Product/Process CR PC021904-01 Detail (Version 11 associated changes effective July 31, 2004; Version 22 associated changes June 23, 2005; CR Completed on July 20, 2005)

Qwest June 15, 2004 Process Notification of proposed Version 11 changes

CLEC Comments and Qwest Response: Qwest July 15, 2004 Process Notification of Qwest response to document in review, including CLEC Comments and Qwest's response to Qwest proposed Version 11 changes; “Associated CR Number . . . CLEC CR # PC021904-01”

Qwest June 29, 2004 Process Notification and Reissue of Version 11 (Qwest revised Version 11 to exclude Washington from the Pre-approved Expedite Process)

A-3. Expansion of the Original Conditions to Add Additional Conditions

Version 22 Qwest Redline: Version 22 redline changes for “Associated CR Number.....CLEC CR # PC021904-01” Qwest proposed to the Expedite and Escalations Overview PCAT (adding additional emergency expedite criteria)

Qwest May 9, 2005 Process Notification for Version 22 of the Expedites and Escalation Overview

A-4. Expansion of Optional, Additional Pay-for-Expedites Not Meeting Criteria Process ("Pre-Approved Expedite" Process) to Add Two Products

Version 27 Qwest Redline: Version 27 Qwest initiated redline changes for "Associated CR Number.....Not Applicable" the Expedite and Escalations Overview PCAT (removing analog loops from the emergency expedite process (Expedites requiring approval)) and adding analog loops to the Pre-approved expedite)

Qwest October 12, 2005 Process Notification - Version 27

A-5. Qwest Attempted to Change the Expedites Process to Exclude CLEC-Caused Disconnects in Error, But Retracted its Proposal After Eschelon Objected

Qwest October 17, 2005 Process Notification for Version 29 of the Escalation and Expedite Overview PCAT

Version 29 Qwest Redline: Version 29 redline of the Expedite and Escalations Overview PCAT (adding detail that attempted to limit the emergency criteria for the emergency expedite process)

Eschelon email objecting to Qwest's Level 1 designation

Qwest October 17, 2005 Process Notification retracting Version 29

A-6. Two Expedite Processes (Requiring Approval and For Pay) Exist, But Qwest Will No Long Honor the Expedites Process Requiring Approval for Unbundled Loop Products, Even When Conditions Met. For Loops, Expedites Only Available If CLEC Agrees to a Per Day Rate Structure

October 19, 2005 Qwest Process Notification for Version 30 of the Escalation and Expedite Overview PCAT

Version 29 Qwest Redline: Version 29 redline of the Expedite and Escalations Overview PCAT (adding language the removes the capability to expedite using the emergency expedite process for several products, including loops)

A-7. CLEC Objections, Qwest's Denials, and Dispute Resolution

Eschelon October 21, 2005 Request for Ad Hoc Call

McLeodUSA October 27, 2005 escalation (escalating the Version 27 change removing 2 wire and 4 wire loops from the emergency expedite process)

Qwest November 7, 2005 email advising CLECs that joined McLeodUSA's escalation that Qwest posted its response to McLeodUSA's escalation

March 28, 2006 Eschelon-Qwest Email exchange confirming Eschelon joined the McLeodUSA escalation

CLEC Comments and Qwest Response: Qwest November 18, 2005 Notification of Qwest response to document in review including CLEC Comments and Qwest's response to Qwest proposed Version 30 changes

Qwest November 4, 2005 response to the McLeodUSA escalation

Eschelon March 21, 2006 Dispute Resolution letter with ICA provisions attached

Eschelon April 3, 2006 Dispute Resolution letter (sent after Eschelon-Qwest call on Friday March 31, 2006)

A-8. Excerpts from Qwest Arizona SGAT

A-9. Qwest Wholesale Change Management Process (CMP) Document

- B. DOCUMENTED FACTS MATRIX (WITH DOCUMENTS CITED IN MATRIX THAT ARE NOT ALREADY INCLUDED IN EXHIBIT A)**
- C. EXAMPLES OF QWEST DISCONNECTS IN ERROR**
- D. EXAMPLES OF EXPEDITE REQUESTS APPROVED BY QWEST FOR UNBUNDLED LOOP ORDERS**
- E. CURRENT QWEST EXPEDITES & OVERVIEW PCAT (V40.0) (AT TIME OF FILING DIRECT TESTIMONY)**

JOHNSON (BJJ) REBUTTAL: ATTACHMENTS TO THE REBUTTAL TESTIMONY OF MS. BONNIE J. JOHNSON

- F. PAGES FROM QWEST PROCESS NOTIFICATIONS FOR VERSIONS 11, 22, 27 AND 30 (SHOWING THAT QWEST INDICATED VERSIONS 11 AND 22 WERE ASSOCIATED WITH THE COVAD CR AND VERSIONS 27 AND 30 WERE NOT ASSOCIATED WITH THE COVAD OR ANY CR)**
- G. EXCERPTS FROM THE JANUARY 2002 CMP REDESIGN MEETING MINUTES AND GAP ANALYSIS**
- H. EXCERPTS FROM THE APRIL 2002 CMP REDESIGN MEETING MINUTES AND ACTION ITEM LOG**

- I. EXCERPTS FROM THE OCTOBER 2001 CMP REDESIGN MEETING MINUTES AND ACTION ITEM LOG
- J. QWEST SEPTEMBER 12, 2005 PROCESS NOTIFICATION VERSION 27 LEVEL 3 CHANGE
- K. SUMMARY OF ESCHELON OBJECTIONS AND DISPUTE RESOLUTION
- L. VERSION 6 RED LINE OF THE ESCALATION AND EXPEDITE OVERVIEW PCAT (DOCUMENTING EXISTING PROCESS BY ADDING MEDICAL EXPEDITES AS AN EMERGENCY CRITERIA)
- M. QWEST SERVICE AMANGEMENT ROLES IN RELATION TO CMP
- N. VERSION 8 RED LINE OF THE ESCALATION AND EXPEDITE OVERVIEW PCAT
- O. ESCHELON MARCH 28, 2003 EMAIL TO QWEST REGARDING ESCALATION TICKET DATABASE DISCUSSED AT EXECUTIVE MEETING HELD EARLIER THAT MONTH
- P. SUMMARY, CMP DOCUMENT OPTIONAL DISPUTE RESOLUTION PROCEDURES AND QWEST RESPONSE TO MULTIPLE CLEC PARTICIPATION

WEBBER DIRECT (ADOPTED BY MR. DOUGLAS DENNEY, "DD"):
ATTACHMENTS TO THE DIRECT TESTIMONY OF MR. WEBBER (ADOPTED BY MR. DENNEY)

- A. CURRICULUM VITAE OF MR. JAMES WEBBER (NOT ADOPTED)
- B. SECTION 4.1 OF QWEST'S ARIZONA COMPETITIVE PRIVATE LINE TRANSPORT SERVICES TARIFF (SECTION 4.1.4, EXPEDITES) AND QWEST'S ARIZONA ADVANCED COMMUNICATIONS SERVICES TARIFF SECTION 3.1 (ORDER MODIFICATION)
- C. EXCERPTS FROM QWEST'S ARIZONA FEBRUARY 10, 2005 SGAT; EXHIBIT A (INCLUDES LOOP INSTALLATION, EXPEDITES AND NOTES)

**DENNEY (DD) REBUTTAL: ATTACHMENTS TO THE REBUTTAL TESTIMONY
OF MR. DOUGLAS DENNEY**

- DD-1 A LIST OF ESCHELON DIRECT AND REBUTTAL EXHIBITS**
- DD-2 A CHART REGARDING EXPEDITE CAPABILITY FOR UNBUNDLED
LOOPS.**
- DD-3 CONTRACT PROVISIONS TAKEN FROM THE CURRENT QWEST-
ESCHELON INTERCONNECTION AGREEMENT (ICA) IN ARIZONA**
- DD-4 EXCERPTS FROM THE UNE COST DOCKET ORDER AND QWEST'S
TESTIMONY REGARDING EXPEDITES AND AN ICB RATE IN THAT
CASE**
- DD-5 QWEST'S EXPEDITE AMENDMENT REQUIRING A RATE OF \$200 PER
DAY**
- DD-6 JEAN NOVAK AND CHRIS SIEWERT OF QWEST VOICE MAIL FOR
RHONDA KNUDSON OF ESCHELON REGARDING QWEST'S DECISION
NOT TO EXPEDITE ESCHELON'S REQUEST**
- DD-7 CURRENT AND HISTORICAL TARIFF PAGES FROM QWEST'S TARIFF
FCC #1 AND QWEST'S ARIZONA COMPETITIVE PRIVATE LINE
TRANSPORT SERVICES REGARDING EXPEDITES (FCC TARIFF
DOCUMENTS INCLUDES QWEST'S TRANSMITTAL TO THE FCC
EXPLAINING ITS CHANGE IN THE EXPEDITE RATE)**
- DD-8 DISCUSSION OF FACTS IN RESPONSE TO THE TESTIMONY OF JEAN
NOVAK OF QWEST SURROUNDING PAYMENT DISPUTES BETWEEN
ESCHELON AND QWEST (INCLUDES *CONFIDENTIAL* ATTACHMENT A
CONTAINING A CHRONOLOGY OF THE DISPUTE)**
- DD-9 ESCHELON DESIGNATION OF CUSTOMER-IDENTIFYING
INFORMATION (INCLUDING CUSTOMER NAME) AS CONFIDENTIAL
CUSTOMER PROPRIETARY INFORMATION (CPNI)**

EXHIBIT

"DD-2"

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE COMPLAINT)	DOCKET NO. T-01051B-06-0257
OF ESCHELON TELECOM OF ARIZONA,)	DOCKET NO. T-03406A-06-0257
INC. AGAINST QWEST CORPORATION)	
)	

EXHIBIT DD-2

TO THE

REBUTTAL TESTIMONY

OF

DOUGLAS DENNEY

ON BEHALF OF

ESCHELON TELECOM OF ARIZONA, INC.

February 13, 2007

**EXPEDITE CAPABILITY FOR LOOPS – all Qwest states, except WA –
IS EXPEDITE CAPABILITY PROVIDED FOR DSO, DSI, OR NEITHER?**

	EARLIER	PCAT VERSION 11	PCAT VERSION 27	PCAT VERSION 30
Qwest-Eschelon ICA Att. 5: Business Process Requirements: <i>all products</i>	“3.2.2.13 Expedites: [Qwest] shall provide [CLEC] the capability to expedite a service order.” – includes DSO & DSI	<i>No change:</i> “3.2.2.13 Expedites: [Qwest] shall provide [CLEC] the capability to expedite a service order.” – includes DSO & DSI	<i>No change:</i> “3.2.2.13 Expedites: [Qwest] shall provide [CLEC] the capability to expedite a service order.” – includes DSO & DSI	<i>No change:</i> “3.2.2.13 Expedites: [Qwest] shall provide [CLEC] the capability to expedite a service order.” – includes DSO & DSI
CMP Document, §1.0 (Scope of CMP)¹	If ICA & CMP/PCAT conflict, ICA controls	<i>No change:</i> If ICA & CMP/PCAT conflict, ICA controls	<i>No change:</i> If ICA & CMP/PCAT conflict, ICA controls	<i>No change:</i> If ICA & CMP/PCAT conflict, ICA controls
Emergency-based “Requiring Approval” (no addt’l fee) – NO AMENDMENT	DSO DSI	DSO DSI	DSO DSI	NEITHER (v.30 removed loops from emergency-based expedite capability)
Emergency-based “Requiring Approval” (no addt’l fee) – W/ AMENDMENT	No amendment at that time	DSO	NEITHER (v.27 added DSO to list of products eligible for fee- added expedite capability)	NEITHER
Fee-added “Pre- Approved” (\$200 per day advanced)² – NO AMENDMENT	NEITHER	NEITHER	NEITHER	NEITHER
Fee-added “Pre- Approved” (\$200 per day advanced) – W/ AMENDMENT	No amendment at that time	DSI	DSO DSI	DSO DSI

¹ “In cases of conflict between the changes implemented through this CMP and any CLEC interconnection agreement (whether based on the Qwest SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such interconnection agreement. In addition, if changes implemented through this CMP do not necessarily present a direct conflict with a CLEC interconnection agreement, but would abridge or expand the rights of a party to such agreement, the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such agreement.” Qwest CMP Document, §1.0 [AZ Complaint Exhibit BJJ A-9 (000173)] available at http://www.qwest.com/wholesale/downloads/2006/061030/QwestWholesaleChangeManagementDocument_10_30_06.doc

² 5 day interval for loops: If advanced 5 days, \$200 X 5 = \$1,000

EXHIBIT

"DD-3"

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE COMPLAINT)	DOCKET NO. T-01051B-06-0257
OF ESCHELON TELECOM OF ARIZONA,)	DOCKET NO. T-03406A-06-0257
INC. AGAINST QWEST CORPORATION)	
)	

EXHIBIT DD-3

TO THE

REBUTTAL TESTIMONY

OF

DOUGLAS DENNEY

ON BEHALF OF

ESCHELON TELECOM OF ARIZONA, INC.

February 13, 2007

ICA PROVISIONS - ARIZONA
(See footnotes for CO/MN/OR/UT/WA)

EXCERPTS FROM ATTACHMENT 5 (BUSINESS PROCESS REQUIREMENTS)

3.2.2 Service Migrations and New Customer Additions¹

3.2.2.12 Expedite Process: U S WEST and CO-PROVIDER shall mutually develop expedite procedures to be followed when CO-PROVIDER determines an expedite is required to meet subscriber service needs.

3.2.2.13 Expedites: U S WEST shall provide CO-PROVIDER the capability to expedite a service order. Within two (2) business hours after a request from CO-PROVIDER for an expedited order, U S WEST shall notify CO-PROVIDER of U S WEST's confirmation to complete, or not complete, the order within the expedited interval.

3.2.4 Due Date²

3.2.4.2 For those services and circumstances that U S WEST and CO-PROVIDER agree shall be handled by the standard interval process, U S WEST shall supply CO-PROVIDER with standard due date intervals on a nondiscriminatory basis to be used by CO-PROVIDER personnel to determine service installation dates. Under those circumstances U S WEST shall complete the provisioning within the standard interval.

3.2.4.2.1 If CO-PROVIDER requests a due date earlier than the standard due date interval, then expedite charges may apply.

3.2.4.3 For those services and circumstances that U S WEST and CO-PROVIDER agree shall be handled by the requested/committed due date process, CO-PROVIDER may request a due date on each order. U S WEST will provide an offered due date on a nondiscriminatory basis. If CO-PROVIDER accepts the offered due date then such date shall become the committed due date. U S WEST will complete the order on the committed due date unless otherwise authorized by CO-PROVIDER.

3.2.4.3.1 If CO-PROVIDER requires a due date earlier than the U S WEST offered due date and U S WEST agrees to meet the CO-PROVIDER required due date, then that required due date becomes the committed due date and expedite charges may apply.

¹ See Colorado ICA Attachment 8 Business Processes Sections: 2.1.17, 2.2.13, Minnesota ICA Attachment -5 Section 7.4.2 and Section 9.2, Oregon ICA Attachment 5 Section 7.4.2 and Section 9.2, Utah ICA Attachment 5 Sections 3.2.2.12 and 3.2.2.13, Washington ICA Attachment 5 Sections 3.2.2.12 and 3.2.2.13

² See Colorado ICA Attachment 8 Business Processes Section: 2.2.2.1.6, Minnesota ICA Attachment 5 Section 9.1 and Section 9.3, Oregon ICA Attachment 5 Section 9.1 and Section 9.3, Utah ICA Attachment -5 Section 3.2.4, Washington ICA Attachment 5 Section 3.2.4

3.2.4.4 Subsequent to an initial order submission, CO-PROVIDER may request a new/revised due date that is earlier than the committed due date. If U S WEST agrees to meet that new/revised due date, then that new/revised due date becomes the committed due date and expedite charges may apply.

SEE ALSO –

2.1 General Business Requirements³

2.1.4.7 U S WEST shall provide provisioning support outside of scheduled work hours on a nondiscriminatory exception basis as requested by COPROVIDER. Such support may be subject to a minimum labor charge.

3.2.2 Service Migrations and New Customer Additions (see addt'l provisions – above)

3.2.2.5 For Customer conversions requiring coordinated cut-over activities, U S WEST and CO-PROVIDER will agree on a scheduled conversion time(s), which will be a designated two-hour time period within a designated date. Unless expedited, U S WEST and CO-PROVIDER shall schedule the cut-over window at least forty-eight (48) hours in advance, and as part of the scheduling, U S WEST shall estimate for CO-PROVIDER the duration of any service interruption that the cut-over might cause. The cut-over time will be defined as a thirty (30) minute window within which both the CO-PROVIDER and U S WEST personnel will make telephone contact to complete the cut-over.

4. Connectivity Billing and Recording⁴

This Section 4 describes the requirements for U S WEST to bill and record all charges CO-PROVIDER incurs for purchasing services under this Agreement.

4.1.2 U S WEST shall record and bill in accordance with this Agreement those charges COPROVIDER incurs as a result of CO-PROVIDER purchasing from U S WEST services, as set forth in this Agreement (hereinafter "Connectivity Charges").

4.1.18 Bill Reconciliation⁵

4.1.18.4 If the dispute is not resolved within the allotted time frame, the following resolution procedure shall begin:

³ See Colorado ICA Attachment 8 Business Processes Section: 2.1.2.4, Minnesota ICA Attachment 5 Section 2.4, Oregon ICA Attachment 5 Section 2.4, Utah ICA Attachment 5 Section 2.1.4.7, Washington ICA Attachment 5 Section 2.1.4.7

⁴ See Colorado ICA Attachment 8 Business Processes Section 3.1.2, Minnesota ICA Attachment 7 Section 2.1, Oregon ICA Attachment 7 Section 2.1, Utah ICA Attachment 5 Section 4.1.2, Washington ICA Attachment 5 Section 4.1.2

⁵ See Colorado ICA Attachment 8 Business Processes Section 3.1.18.4, Minnesota ICA Attachment 7 Section 14, Oregon ICA Attachment 7 Section 14, Utah ICA Attachment 5 Section 4.1.18.4, Washington ICA Section 4.1.18.4

4.1.18.4.1 If the dispute is not resolved within sixty (60) days of the Notice of Discrepancy, the dispute shall be escalated to the second level of management for resolution.

4.1.18.4.2 If the dispute is not resolved within ninety (90) days of Notice of Discrepancy, the dispute shall be escalated to the third level of management for resolution.

4.1.18.4.3 If the dispute is not resolved within one hundred and twenty (120) days of the Notice of Discrepancy, upon the written request of either Party within such one hundred and twenty (120) day period, the dispute may be resolved pursuant to the dispute resolution provision set forth in Part A of this Agreement.

6.2 General Requirements⁶

6.2.1 U S WEST shall provide repair, maintenance, testing, and surveillance for all Telecommunications Services and unbundled Network Elements and Combinations in accordance with the terms and conditions of this Agreement.

6.2.1.1 U S WEST shall provide CO-PROVIDER with the same level of maintenance support as U S WEST provides itself in accordance with standards and performance measurements that U S WEST uses and/or which are required by law, regulatory agency, or by U S WEST's own internal procedures, whichever are the most rigorous. These standards shall apply to the quality of the technology, equipment, facilities, processes, and techniques (including, but not limited to, such new architecture, equipment, facilities, and interfaces as U S WEST may deploy) that U S WEST provides to CO-PROVIDER under this Agreement.

EXCERPTS FROM PART A (TERMS AND CONDITIONS)

Scope of Agreement

I. Except as otherwise provided for in Section 8 of Attachment 2,⁷ U S WEST shall not discontinue or refuse to provide any service required hereunder without CO-PROVIDER's prior written agreement in accordance with Section 17 of this Part A of this Agreement,

⁶ See Colorado ICA Attachment 8 Business Processes Section 5.1.2, See Minnesota ICA Attachment 6 Section 1, Oregon ICA Attachment 6 Section 4, Utah ICA Attachment 5 Section 6.2.1, Washington ICA Attachment 5 Section 6.2.1

⁷ Attachment 2 is the Resale section of the ICA.

3. Payment⁸

3.1 In consideration of the services provided by U S WEST under this Agreement, COPROVIDER shall pay the charges set forth in Attachment 1 to this Agreement. The billing procedures for charges incurred by CO-PROVIDER hereunder are set forth in Attachment 5 to this Agreement.

3.2 Amounts payable under this Agreement, unless reasonably disputed, are due and payable within thirty (30) days after the date of U S WEST's invoice or within twenty (20) days after receipt of the invoice, whichever is later. If the payment due date is not a Business Day, the payment shall be made the next Business Day.

17. Amendment of Agreement

17.1 Except as otherwise provided in this Agreement, no amendment or waiver of any provision of this Agreement, and no consent to any default under this Agreement, shall be effective unless the same is in writing and signed by an officer of the Party against whom such amendment, waiver or consent is claimed. If either Party desires an amendment to this Agreement during the term of this Agreement, it shall provide written notice thereof to the other Party describing the nature of the requested amendment. If the Parties are unable to agree on the terms of the amendment within thirty (30) days after the initial request therefor, the Party requesting the amendment may invoke the dispute resolution process under Section 27 of this Part A of this Agreement to determine the terms of any amendment to this Agreement.

21. Governing Law

21.1 This Agreement shall be governed by and construed in accordance with the Act and the FCC's rules and regulations, except insofar as state law may control any aspect of this Agreement, in which case the domestic laws of the State of Arizona, without regard to its conflicts of laws principles, shall govern.

24. Compliance

24.1 Each Party shall comply with all applicable federal, state, and local laws, rules and regulations applicable to its performance under this Agreement.

24.3 All terms, conditions and operations under this Agreement shall be performed in accordance with all applicable laws, regulations and judicial or regulatory decisions of all duly constituted governmental authorities with appropriate jurisdiction, and this Agreement shall be implemented consistent with the FCC Interconnection Order and any applicable Commission orders. . . .

⁸ See Colorado ICA Part A Section 5.1, Minnesota ICA Part A Section: 2.1, Oregon ICA Part A Section 2.1, Utah ICA Part A Section 3.1 and Section 3.2, Washington ICA Part A Section 3.1 and Section 3.2

27. Dispute Resolution⁹

27.2 In the event CO-PROVIDER and U S WEST are unable to agree on certain issues during the term of this Agreement, the Parties may identify such issues for arbitration before the Commission. Only those points identified by the Parties for arbitration will be submitted.

31. Warranties¹⁰

31.1 U S WEST shall conduct all activities and interfaces which are provided for under this Agreement with CO-PROVIDER Customers in a carrier-neutral, nondiscriminatory manner.

53. Entire Agreement

53.2 If a provision contained in any U S WEST tariff conflicts with any provision of this Agreement, the provision of this Agreement shall control, unless otherwise ordered by the FCC or the Commission.

EXCERPT FROM ATTACHMENT 1 (RATES AND CHARGES)

1. General Principles¹¹

1.2 Except as otherwise specified in this Agreement, as approved or ordered by the Commission, or as agreed to by the Parties through good faith negotiations, nothing in this Agreement shall prevent a Party through the dispute resolution process described in this Agreement from seeking to recover the costs and expenses, if any, it may incur in (a) complying with and implementing its obligations under this Agreement, the Act, and the rules, regulations and orders of the FCC and the Commission, and (b) the development, modification, technical installation and maintenance of any systems or other infrastructure which it requires to comply with and to continue complying with its responsibilities and obligations under this Agreement.

EXCERPT FROM ATTACHMENT 3 (UNBUNDLED NETWORK ELEMENTS)

2. Unbundled Network Elements

2.1 U S WEST shall offer Network Elements to CO-PROVIDER on an unbundled basis on rates, terms and conditions that are just, reasonable, and non-discriminatory in accordance with the terms and conditions of this Agreement.

⁹ See Colorado ICA Part A Section 24.1, Minnesota ICA Part A Section 11, Oregon ICA Part A Section 11, Utah ICA Part A Section 27.2, Washington ICA Part A Section 27.2

¹⁰ See Colorado ICA Part A Section 14.1, Minnesota ICA Part A Section 9.2, Oregon ICA Part A Section 9.2, Utah ICA Part A Section 31.1, Washington ICA Part A Section 31.1

¹¹ Utah ICA Attachment 1 Section 1.2, Washington ICA Attachment 1 Section 1.2

EXHIBIT

"DD-4"

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE COMPLAINT)	DOCKET NO. T-01051B-06-0257
OF ESCHELON TELECOM OF ARIZONA,)	DOCKET NO. T-03406A-06-0257
INC. AGAINST QWEST CORPORATION)	
)	

EXHIBIT DD-4

TO THE

REBUTTAL TESTIMONY

OF

DOUGLAS DENNEY

ON BEHALF OF

ESCHELON TELECOM OF ARIZONA, INC.

February 13, 2007

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

RECEIVED
AT&T Corp. Legal - Denver

MAR 15 2001

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IN THE MATTER OF INVESTIGATION INTO
Qwest CORPORATION'S COMPLIANCE
WITH CERTAIN WHOLESALE PRICING
REQUIREMENTS FOR UNBUNDLED
NETWORK ELEMENTS AND RESALE
DISCOUNTS

)
)
) DOCKET NO. T-00000A-00-0194
) Phase II
)
)
)

DIRECT TESTIMONY OF

ROBERT F. KENNEDY

QWEST CORPORATION

March 15, 2001

1
2
3 **Q. PLEASE DESCRIBE THE CHARGE THAT APPLIES WHEN A CLEC USES**
4 **CLEC-TO-CLEC CROSS-CONNECTIONS TO CONNECT WITH ANOTHER**
5 **CLEC'S COLLOCATION.**

6 **A. A one-time CLEC-to-CLEC Cross-Connection charge is the only rate that applies**
7 **when a CLECs' uses Connecting Facility Assignments (CFA) residing on an**
8 **Interconnection Distribution Frame (ICDF). Both CLECs must terminate at the**
9 **same service rate level (i.e. DS1, DS3). Termination cables must be in place to**
10 **the ICDFs. The CLEC may obtain the termination cables through the standard**
11 **collocation ordering process.**

12 **VII. UNBUNDLED NETWORK ELEMENTS (UNES)**

13 **A. INTERCONNECTION TIE PAIRS (ITP)**

14 **Q. WHAT IS AN INTERCONNECTION TIE PAIR (ITP)?**

15 **A. An interconnection tie pair (ITP) is a connection between UNES and a demarcation**
16 **point at an ICDF.**

17 **Q. WHAT RATE ELEMENTS ARE BEING PRESENTED FOR THE ITP?**

18 **A. Recurring charges apply for DSO, DS1, and DS3 connections.**

1 **Q. WHICH E-UDF RECURRING CHARGES DOES QWEST PROPOSE?**

2 **A.** Qwest proposes the following recurring charges for E-UDF:

3 (1) Termination at Wire Center, per pair

4 (2) Termination at Premises, per pair

5 (3) E-UDF-Loop Fiber, per pair

6 (4) Fiber Cross-Connect, per pair

7 **Q. WHICH E-UDF NONRECURRING CHARGES DOES QWEST PROPOSE?**

8 **A.** Qwest propose the following E-UDF nonrecurring charges:

9 (1) Order Charge, per pair, per route, per order

10 (2) Each Additional, per pair, same route

11 (3) Fiber Cross-Connect, per pair

12
13
14
15
16 **J. MISCELLANEOUS NONRECURRING CHARGES**

17 **Q. PLEASE GENERALLY DESCRIBE THE NATURE OF THE ACTIVITIES FOR**
18 **WHICH MISCELLANEOUS NONRECURRING CHARGES WOULD APPLY.**

19 **A.** Miscellaneous Nonrecurring Charges are intended to cover additional engineering,
20 labor and testing when incurred by Qwest. Miscellaneous charges may be
21 assessed when at the direction of a CLEC a work activity is requested that is not
22 part of the nonrecurring charges normally associated with a product. A CLEC may

1 also be charged a miscellaneous non recurring charge when a CLEC reports a
2 trouble condition and through testing Qwest discovers the trouble in the network
3 which the CLEC is responsible for.

4 **Q. PLEASE PROVIDE A LIST OF THE MISCELLANEOUS NONRECURRING**
5 **CHARGES?**

6 A. Additional Engineering - Basic (Per 1/2 Hour)
7 Additional Engineering - Overtime (Per 1/2 Hour)
8 Additional Labor Installation-Overtime (Per 1/2 Hour)
9 Additional Labor Installation-Premium (Per 1/2 Hour)
10 Additional Labor Other-Basic (Per 1/2 Hour)
11 Additional Labor Other-Overtime (Per 1/2 Hour)
12 Additional Labor Other-Premium (Per 1/2 Hour)
13 Testing and Maintenance Basic (Per 1/2 Hour)
14 Testing and Maintenance Overtime (Per 1/2 Hour)
15 Testing and Maintenance Premium (Per 1/2 Hour)
16 Maintenance of Service-Basic (Per1/2 Hour)
17 Maintenance of Service-Overtime (Per1/2 Hour)
18 Maintenance of Service-Premium (Per1/2 Hour)
19 Additional Coop Acceptance Test-Basic (Per1/2 Hour)
20 Additional Coop Acceptance Test-Overtime (Per1/2 Hour)
21 Additional Coop Acceptance Test-Premium (Per1/2 Hour)
22 Nonscheduled Coop Test-Basic (Per 1/2 Hour)

1 Nonscheduled Coop Test-Overtime (Per 1/2 Hour)
2 Nonscheduled Coop Test-Premium (Per 1/2 Hour)
3 Nonscheduled Manual Test-Basic (Per 1/2 Hour)
4 Nonscheduled Manual Test-Overtime (Per 1/2 Hour)
5 Nonscheduled Manual Test-Premium (Per 1/2 Hour)
6 Cooperative Scheduled Test-LOSS (Per Month)
7 Coop Scheduled Test-C-Message Noise (Per Month)
8 Coop Scheduled Test-Balance (Per Month)
9 Coop Scheduled Test-Gain Slope (Per Month)
10 Coop Scheduled Test-C Notched Noise (Per Month)
11 Manual Scheduled Test – Loss
12 Manual Scheduled Test-C-Message Noise (Per Month)
13 Manual Scheduled Test-Balance (Per Month)
14 Manual Scheduled Test-Gain Slope (Per Month)
15 Manual Scheduled Test-C Notched Noise (Per Month)

16
17 **Q. DOES QWEST PROPOSE OTHER MISCELLANEOUS ELEMENTS IN**
18 **ADDITION TO THOSE ADDRESSED IN THIS PROCEEDING?**

19 **A.** Yes. Qwest proposes to introduce Additional Dispatch Charge, Date Change and
20 Design Change elements in this cost proceeding.

21 **Q. PLEASE DESCRIBE WHEN A NONRECURRING CHARGE WOULD APPLY**
22 **FOR ADDITIONAL DISPATCH.**

1 A. A nonrecurring charge would apply when, at the request of the CLEC, a Qwest
2 technician is dispatched an additional time to a CLEC designated location.

3 **Q. PLEASE DESCRIBE WHEN A NONRECURRING CHARGE WOULD APPLY**
4 **FOR DATE CHANGE.**

5 A. A Date Change nonrecurring charge would apply when the CLEC changes a
6 previously established due date for service. Such a change necessitates the
7 issuance of a new service order.

8 **Q. PLEASE DESCRIBE WHEN AN INDIVIDUAL NONRECURRING CHARGE**
9 **WOULD APPLY FOR DESIGN CHANGE.**

10 A. A nonrecurring charge would apply when a design change occurs that requires an
11 engineer's review. Such design changes may include a change of end user
12 premises, the addition or deletion of optional features or functions, or a change in
13 the type of transport termination.

14 **Q. HOW DOES QWEST PROPOSE TO CHARGE FOR EXPEDITES AND**
15 **CANCELLATIONS?**

16 A. Qwest proposes to charge for Expedites and Cancellations on an ICB basis.

17